

61-650

No.

(V)

Supreme Court, U.S.

FILED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THE MARYLAND CLASSIFIED
EMPLOYEES ASSOCIATION, INC., ET AL.,
Petitioners,

v.

WILLIAM DONALD SCHAEFER,
GOVERNOR OF MARYLAND, AND
THE STATE OF MARYLAND, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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QUESTIONS PRESENTED FOR REVIEW

1. Whether increasing Maryland state employees' hours without a concomitant increase in salary constitutes an impairment of contract for the purposes of article 1, §10 of the United States Constitution.

2. Whether increasing the hours worked for Maryland state employees without a concomitant increase in salary was a reasonable and necessary impairment of contract under the circumstances.

LIST OF PARTIES

A. Those parties listed in the caption of this case, and Denise Kable, Teresa Whitmore, Diana Phelps, and Romani Amenu-El, are Petitioners herein

B. The following parties were Appellees with Petitioners in the proceeding in the Court of Appeals for Maryland:

1. American Federation of State, County and Municipal Employees, Local 1027, and Employees Association, and Mildred Womble, Indra Pierce, Sylvia Seymour, Connie Powell, Mary Cox, Mary Hall, Nancy Brant, Sally Davies

C. Hilda Ford, Secretary of Personnel, for the State of Maryland

D. The Board of Regents of the University of Maryland System.

E. Donald N. Langenberg, Chancellor, University of Maryland.

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OPINIONS BELOW

The Per Curiam Opinion of the Court of Appeals of Maryland, appears at Appendix 1 (unreported).

The opinion of the Circuit Court for Anne Arundel County, unreported, appears at Appendix 4 (unreported).

Jurisdiction

The opinion and judgment of the Maryland Court of Appeals was rendered in this case on July 17, 1991. This Petition for a Writ of Certiorari was filed within 90 days of July 17, 1991 as is required by 28 U.S.C. §2101(c). Jurisdiction of the Supreme Court is evoked under the provisions of 28 U.S.C. §1257.

STATUTES AND RULES INVOLVED

1. United States Constitution,

Article 1, §10:

No state shall enter into any treaty, alliance, or confederations; grant letter of marque and reprisal; coin money; omit bills of credit; make anything but gold and silver coin tendered in payment of debts; pass any bill of attainder; expose facto law, or law impairing the obligation of contracts, or grant any title of nobility...

(Full text at Apx. 23)

2. Annotated Code of Maryland,

Article 100, §76 (full text at Apx.70).

3. Annotated Code of Maryland,

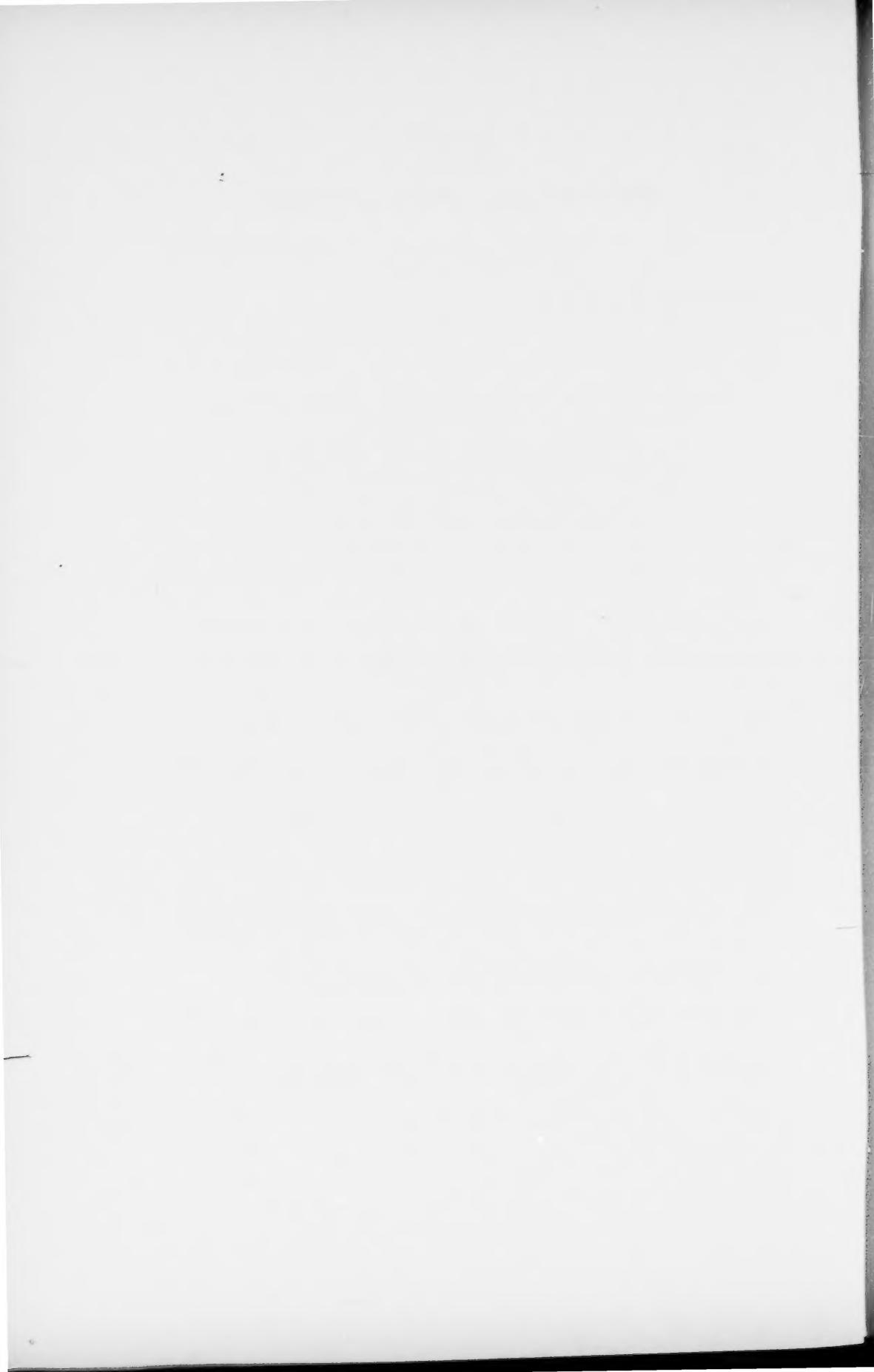
art. 64 A, § 56. (full text at Apx.77).

4. Code or Maryland Regulations

06.01.42A (full text at Apx.79).

5. Code of Maryland Regulations

06.01.01.14D (full text at Apx.84).



No.

IN THE

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OCTOBER TERM, 1991

THE MARYLAND CLASSIFIED
EMPLOYEES ASSOCIATION, INC., ET AL.,
Petitioners,

v.

WILLIAM DONALD SCHAEFER,
GOVERNOR OF MARYLAND, AND
THE STATE OF MARYLAND, ET AL.,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND**



STATEMENT OF THE CASE

A. THE PROCEEDINGS BELOW:

This action originated as a Complaint for Declaratory Judgment and Damages, brought by the Petitioners¹ in response to action taken by the Governor of Maryland in the form of an Executive Order. Through Executive Order 01.01.1991.15, the Governor of Maryland increased the work week from thirty-five and one half hours to forty hours for roughly 33,000 employees of the State of Maryland, without any additional salary. In May 1991, Petitioners filed suit in the Circuit Court for Anne Arundel County, Maryland alleging a taking of property in violation of the United States Constitution, 14th Amendment,

¹This action was originally styled as a class action on behalf of all similarly-situated state employees. By agreement of counsel, this action proceeded on behalf of the individually-named Petitioners only.

violation of their civil rights, specifically the United States Constitution, 5th Amendment and Article 1, §10 of the United States Constitution, along with violations of Maryland law, rules and regulations. Petitioners raised the constitutional question in this case in their Complaint at p.12, ¶37, and Count five of their Complaint.

Plaintiffs filed a Motion for Summary Judgment on June 7, 1991 and on June 19, 1991 a companion suit and motion to consolidate was filed by the American Federation of State County and Municipal Employees, et al. which was later consolidated with the original action.

Argument was held on the motions and cross motions for Summary Judgment on July 1, 1991, and on July 9, 1991 Judge Raymond Thieme, Jr. of the Circuit Court for Anne Arundel County issued a Memorandum and Order finding against the

Plaintiffs on all grounds, including a finding that if the State had created a contract with a future guarantees of wages it would have surrendered a essential element of sovereignty, and hence the executive Order did not violate any contract or constitutional rights of the Plaintiffs.

Immediately after that holding, Petitioners filed a Petition for Writ of Certiorari with the Maryland Court of Appeals. That Petition also raised the issue of constitutional impairment of contract. By agreement of the parties and after consultation with the Chief Judge of the Maryland Court of Appeals, the case proceeded on an expedited basis, and a hearing was held before the Maryland Court of Appeals on July 16, 1991, pursuant to the Writ. In argument before the Maryland Court of Appeals the issue of impairment of contract was raised and

argued. On July 17, 1991 a Per Curiam Order was issued by Chief Judge Robert Murphy affirming the decision of the Circuit Court for Anne Arundel County and stating that an Opinion was to be filed later.

A. STATEMENT OF RELEVANT FACTS: ²

Petitioners are all classified employees of the State of Maryland each of whom is employed by a state agency under the Executive branch of state government. Each Petitioner has worked for the state for many years, e.g. Denise Kable - 22 years, Teresa Whitmore - 21.5 years, Rommani Amenu-El - 6 years. Each of the Petitioners have worked 35 1/2 hours per week since the inception of their employment with Maryland. At the time of the inception of this suit, each of the Petitioners worked in an agency

² A stipulation of fact appears in Appendix 25 .

with a designated 35 1/2 hour work week, with overtime benefits accruing at a straight time rates for hours worked between 35 1/2 and 40 hours per week with time and one half-benefits for hours worked in excess of 40 hours per week, pursuant to the Annotated Code of Maryland, art. 100, §76 and the Code of Maryland Regulations ("COMAR"). All had received overtime benefits in accord with this plan. The 35 1/2 hour work week had been in force for state departments generally since September, 1945; institutional employees other than office workers had a work week of 40 hours effective May 14, 1956 and did not receive overtime compensation unless they had worked in excess of 40 hours. Those institutional employees are not a part of this action.

On February 27, 1991 the Governor issued Executive Order 01.01.1991.15

(Apx. 68), declaring "...the normal work week for state employees shall be 40 hours effective . . . July 1, 1991." There was no legislative finding of a fiscal crisis or emergency, and the Executive Order merely recited that "...during these difficult fiscal times it is prudent to search for savings for the taxpayers of this state.

At the time the Executive Order was promulgated, Maryland Law provided that

Except as otherwise provided in this section, every state employee who works in excess of the normal work week for his department, bureau board, commission or agency shall receive extra compensation for such hours worked in excess of that time. The amount of compensation for such excess shall be computed in the following manner:

1. Payment for time worked in excess of the positions normal work week but not in excess of 40 hours shall be made at the employee's usual hourly rate or rates.

Annotated Code of Maryland, art. 100,

§76. Each of the Petitioners worked for any agency that had a normal work week of 35 1/2 hours per week. This work week is designated by the appointing authority, pursuant to COMAR "The appointing authority shall designate the work week for all positions under the appointing authorities control, and shall file the designation with the Secretary. The designation of the work week hours is effective until the appointed authority changes it." COMAR 06.01.10.42A

Pursuant to the Executive Order the appointing authorities for each agency changed the normal work week designation from 35 1/2 hours to 40 hours.

Each of the Petitioners has subsequently been required to work forty hours per week without additional compensation for the time worked between 35 1/2 hours and 40 hours.

Petitioner's request for relief has

been denied by both the Circuit Court for
Anne Arundel County, and the Maryland
Court of Appeals.

ARGUMENT

A. Introduction

Petitioners are all state employees whose benefits and compensation are prescribed by Maryland law and regulation. These laws and regulations constitute a contract, enforceable by the Petitioners through a grievance procedure available under Maryland law, and a waiver of sovereign immunity on employment issues. There is little question that a state may impair contracts, particularly when those contracts touch upon essential attributes of a state's sovereignty. On the other hand, purely financial obligations - such as the purely financial obligation to compensate state employees - do not automatically fall within the reserved powers doctrine, and are subject to close scrutiny by the courts. These contracts can be modified by state legislatures,

but to pass constitutional muster, must be both reasonable and necessary to serve an important public purpose; they must not merely cost saving measures. United States Trust Company v. New Jersey, 431 U.S. 1, 26-26; 97 S.Ct. 1505 (1976).

The work week for state employees in this case was increased without a proportionate increase in salary in the face of a statute requiring additional compensation for additional work. The purpose of this measure was purely fiscal, made without the benefit of any legislative determination of a fiscal emergency or crisis, and was neither reasonable nor necessary under any standards previously set out by this Court. For the reasons detailed below, this case merits the review by this Court

B. AN ENFORCEABLE CONTRACT EXISTED
BETWEEN MARYLAND AND ITS'S EMPLOYEES

Analysis of contract clause

violations necessarily begins with the inquiry of whether a contract exists.

United State Trust Co., v. New Jersey, 431 U.S. 1 at 17, 97 S. Ct. 1505 (1977).

In general, a statute is treated as a contract where the language and the circumstances evince a legislative intent to create a private right on a contractual nature enforceable against the state. United States Trust, 431 U.S. at 19, n.17.

The Annotated Code of Maryland, art. 100, §76 provides: "Except as otherwise provided in this section, every state employees who works in excess of the normal work week for his department, bureau, board, commission or agency shall receive extra compensation for such hours worked in excess of that time." art. 100

§76. The Code of Maryland Regulations defines "work week" as "... five work days, and at least 35 1/2 hours up to a maximum of 40 hours." COMAR 06.01.01.42A(1)(a). The Appointing Authority has the power to designate the length of the work week. Prior to the Governor's Executive Order changing the work week from 35 1/2 hours to 40 hours, each of the Petitioners had been hired, had worked and had been compensated on the basis of a 35 1/2 hour work week. Each of the appointing authorities for the Petitioners had designated 35 1/2 hours as the applicable work week for their respective agencies which remained in effect until the Governor's Executive Order changing that designation.

The statute requiring payment for hours worked between the normal work week and 40 hours demonstrates a legislative intent to create an enforceable right in

the Petitioners. Specifically, it is found in the portion of the Maryland Code entitled "Work, Labor and Employment" which establishes a broad system of rights protecting all Maryland citizens, including state employees. Md. Ann. Code, art. 100, et. seq. By statute, Maryland has waived sovereign immunity for cases involving the personnel policy, rules and regulations for Classified employees. Md. Ann. Code art. 64A, §56.

Each of the Petitioners was offered and accepted a position --in which they would earn full salary and benefits in exchange for working 35 1/2 hours per week. Each has received overtime and compensatory time for those hours worked between 35 1/2 and 40 hours. These laws and regulations, the Petitioners' bargained for exchange and the state's practices and polices over the last several decades create a private right of

a contractual nature enforceable against the state, as described by this Court in United States Trust Company v. New Jersey, 431 U.S. at 17, n.14.

C. INCREASING THE WORK WEEK IMPAIRED PETITIONERS' CONTRACT RIGHTS

The contract clause prohibits some impairments of contractual obligations by the states; necessarily, the limitations of the contract clause must be balanced against the "essential attributes of sovereign power necessarily reserved by the states to safeguard the welfare of their citizens. U.S. Trust Company, at 21, quoting Home Building & Loan Association v. Blaisdell, 290 U.S. 398, 435, 54 S.Ct. 231 (1934) While a state has the power to legislate in areas of public concern, that state power must be consistent with the fair intent of the constitutional limitation of that power. U.S. Trust Company, Id., Blaisdell, 290

U.S. at 439.

When a state seeks to impair its own contract the court must carefully examine the nature of that impairment.

The initial inquiry concerns the ability of the state to enter into an agreement that limits its power to act in the future. As early as Fletcher v. Peck, the Court considered the argument that "one legislature can not abridge the powers of the succeeding legislature." 6 Cranch, at 135. It is often stated that "the legislature can not bargain away the police power of a state." Stone v. Mississippi, 101 U.S. 814, 817 (1880). (Footnote omitted) This doctrine requires a determination of the state's power to create irrevocable contract rights in the first place, rather than an inquiry into the purpose or reasonableness of the subsequent impairment. In short, the contract clause does not require a state to adhere to a contract that surrenders an essential attribute to its sovereignty. U.S. Trust, 431 U.S. at 23.

Purely financial obligations are generally not regarded as falling into

the category of "reserved powers". While the powers of eminent domain and police powers can not be contracted away, the power to enter into effective financial contracts can not be questioned.

Any financial obligation could be regarded in theory as a relinquishment of the state spending power, since money spent to repay debts is not available for other purposes. Similarly, the taxing power may have to be exercised if debts are to be repaid. Notwithstanding these effects, the court has regularly held that the states are bound by their debt contracts.

United States Trust, 431 U.S. at 24.

(Footnote omitted) Purely financial obligations do not automatically fall within the reserved powers, and do not receive protection as one of the state's immutable rights. U.S. Trust at 25, n.23. Employment benefits, including have been held to fall been found to fall within the reserved powers Maryland State Teachers Association v. Hughes, 594 F.

Supp. 1353, 1362 (1984); cf. cost of living increase for state employees not within reserved powers. Sonoma County v. County of Sonoma, 591 P.2d 1, 154 Cal. Reptr. 903 (1979).

The contract clause is not an absolute bar to modifications of a state's financial obligations and impairments may be constitutional if they are reasonable and necessary to serve important public purposes, however, complete deference to legislative assessments of reasonableness and necessity are not appropriate when a state's self interest is at stake. "If a state could reduce its financial obligations whenever it wanted to spend money for what it regarded as an important public purpose, the contract clause would provide no protection at all." U.S. Trust, 431 U.S. at 25-26. In sum, to sustain an impairment of its own

contract, a state must demonstrate:

1. That the impairment was the result of a legislative exercise of the police powers;
2. That the impairment was reasonable; and
3. That the impairment was necessary to serve an important public purpose.

Analysis of contract impairment is also governed by the gravity of the harm.

"The severity of the impairment measures the height of the hurdle the state legislature must clear." Allied

Structural Steel Company v. Spannaus, 438 U.S. 234, 245, 98 S.Ct. 2716 (1978).

Interference with employment benefits have been determined to be substantial impairments of the contract, Sonoma County v. County of Sonoma, 591 P. 2d. at 7. "An increase in wages is frequently the very heart of an employment contract;

other provisions, including those relating to fringe benefits, are inextricably interwoven with those relating to wages, since employees may surrender various employment benefits in exchange for a wage increase." Id. As in Allied Structural Steel, the harm here is immediate, permanent and severe - the Petitioners are losing additional salary now, are required to remain on the work site or face termination, and there is no expiration date for the Governor's Order.

D. THE IMPAIRMENT OF PETITIONERS' CONTRACT RIGHTS WAS NEITHER REASONABLE NOR NECESSARY TO SERVE AN IMPORTANT PUBLIC PURPOSE

This Court has struck the balance between state's sovereignty and the protections of the contract clause by holding that legislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions of a character

appropriate to the public purpose justifying its adoption. U.S. Trust Company at 22, quoting Home Building & Loan Association v. Blaisdell, 290 U.S. 398 at 445-447 (1934). Typically, courts interpreting this standard have looked to the circumstances requiring the legislature to act and have deemed persuasive legislative findings regarding the existence of an emergency, and whether the relief was limited in time and scope to deal with the necessities at hand Blaisdell 290 U.S. at 238; W.B. Worthen Company v. Thomas, 292 U.S. 426, 432-434, 54 S.Ct. 816 (1934). While the declaration of an emergency with strict limitations on duration are not absolute requirements to assess the reasonableness of legislation, ". . . the existence of an emergency and the limited duration of a release measure are factors to be assessed in determining the

reasonableness of an impairment, but they cannot be regarded as essential in every case." U.S. Trust Company at 23, n.19.

What is critical in this examination is identifying legislative action to establish the need for the impairment and a determination of whether or not the legislation fairly meets that need. What is particularly important in this case is that there was no legislative determination of an emergency or particular need. While it is undeniable that at the time these changes were made Maryland was in the process of making budget reductions, there no declared emergency as in Blaisdell, but rather the Executive Order promulgated by the Governor stated that its purpose was to achieve "cost containment through increase productivity and employee development" and because ". . . it is prudent to search for savings for the

taxpayers of this state." (Apx. 68)

Aside from problems of separation of powers, the increase in hours without a proportionate increase in pay constitutes an impairment of contract, unlimited in scope and duration, without any legislative, or other, determination of an emergency or extreme circumstances. It is simply a situation as described by this Court in United States Trust where the state, by virtue of the Governor's action, is refusing to meet its legitimate financial obligations simply because it would prefer to spend the money to promote public good rather than the private welfare of its creditors; if the State of Maryland could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, contract laws would provide no protection at all.

U.S. Trust at 26, 29. There was no

legislative finding, factual presentation or judicial determination of an emergency in this case: The impairment of contract in this case is simply the result of a desire to spend money elsewhere.

Beyond a legislative determination of the need for impairment, the reasonableness and necessity of the action must be viewed independently. In prior cases, this Court has examined whether an impairment was reasonable, based on its limitation in duration and degree, e.g. W.B. Worthen Co. v. Thomas, 292 U.S. 426, (1974) where the legislation was struck down because of the lack of limitations as to time amount circumstance of need. Similarly in Treigle v. Acme Homestead Association, 297 U.S. 189, 56 S.Ct. 408 (1936) this Court held that the legislation impaired obligations of contract because the legislation was neither "temporary or

conditional." Treigle 297 U.S. at 195. Conversely, impairments have been sustained where the limitations were temporary and conditional. Blaisdell, 290 U.S. at 444-445.

In this instance the impairment is neither temporary nor conditional. The Governor's Executive Order is absolute in its requirements, is in no way temporary excepting by the Governor's unilateral determination that the hours should be changed.

Independent of a determination of reasonableness, courts have also looked to a determination of necessity for the impairment. This analysis requires a review of whether less drastic measures could have achieved the same result and whether, without modifying its obligations at all, a state could have adopted alternative means of achieving its goals. U.S. Trust at 29-30. The

states goal in this situation - saving money - could certainly be achieved by a variety of other means. Indeed, there is a significant question in this case whether increasing the work week without increasing salary saves any money at all. Increasing in the work week logically increases productivity but salaries and spending do not decrease; perhaps there is some savings achieved by the increase in productivity, but the record in this case is devoid of any specific finding of savings. Rather the Secretary of State, in a letter to Senator C. Jemino on an inquiry regarding these purported savings, stated "...it is certainly logical to conclude that savings will result from each of the categories mentioned in the second paragraph above but it is not possible to quantify them until the detailed study is conducted of each position."

This absence is the result of the lack of any legislative findings or determinations at all on these issues and merely points out the principle that the Executive Order was not reasonably calculated to meet an important public purpose. Obviously, there are many alternative means to save money in state government, including decrease in capital spending, reduced public services, temporary furloughs of state employees, etc.; unfortunately because of the lack of any detailed action by the legislature or any other branch of state government, the alternatives have been simply unexplored by the State of Maryland.

CONCLUSION

The court should grant a Writ of Certiorari to the Maryland Court of Appeals to resolve the important constitutional question in this case: whether a state may impair the contract

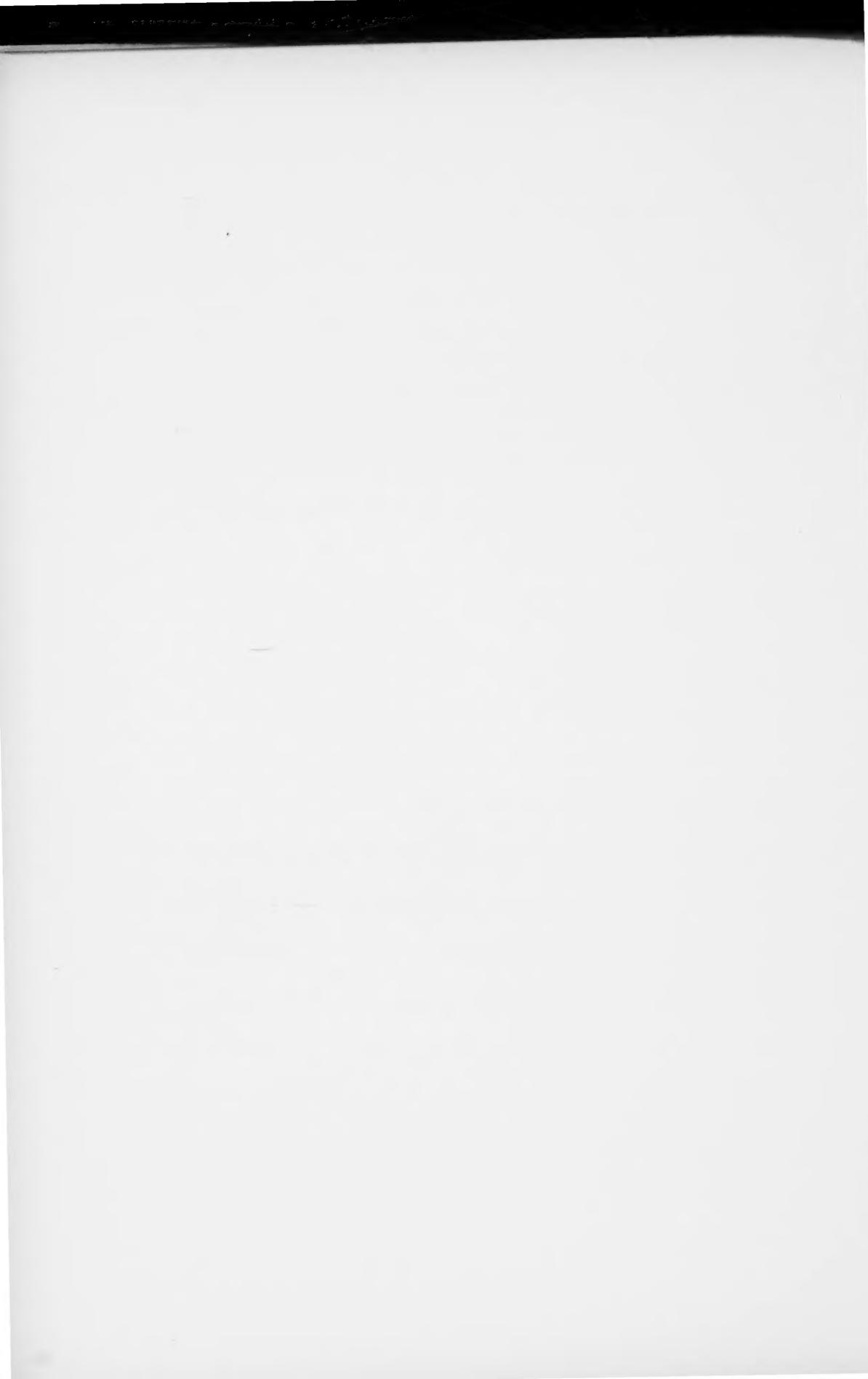
of its employees, without a finding that an important public purpose is being met, and whether the increase in hours without additional salary is reasonable and necessary under the circumstances. On the issue of the extent to which a state may be impair its employees' contracts, there is great disparity among and between the federal and highest state courts. Maryland State Teachers Association v. Hughes, 594 F. Supp. 1353 (1984) finds that changes to pension benefits do not constitute an impairment of contract. The Court of Appeals of New York has determined that the state, in the exercise of its police power, may override provisions of a collective bargaining contract, Subway Surface Supervisors v. New York Transit Authority, 375 N.E. 2d, 384, 44 N.Y. 2d 101 (1984); but the Supreme Court of California has ruled that legislation

eliminating cost of living increases by localities constitutes a severe impairment of its employees' rights. Sonoma County v. County of Sonoma, 152 Cal.Rptr. 903, 591 P. 2d 1 (1979). The United States Court of Appeals for the First Circuit has held that legislation affecting previously negotiated collective bargaining agreement did not violate the contract clause. Local Division 589, etc. v. Commonwealth of Massachusetts, 666 F.2d 618, 641 (1981).

In view of the lack of any legislative findings regarding a fiscal crisis, the apparent unreasonableness and absence of necessity for the actions taken, as well as the disparity among the courts of this land, this case cries out for review.

Respectfully Submitted,

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IN THE COURT OF APPEALS OF MARYLAND

No. 50

September Term, 1991

MARYLAND CLASSIFIED EMPLOYEES
ASSOCIATION, INC. et al.

and

AMERICAN FEDERATION OF STATE,
COUNTY, AND MUNICIPAL EMPLOYEES,
COUNCIL 92, MARYLAND STATE EMPLOYEES
UNION et al.

v.

GOVERNOR WILLIAM DONALD SCHAEFER
et al.

Murphy, C.I.
Eldridge
Rodowsky
McAuliffe
Chasanow
Karwacki
Bell, JJ.

PER CURIAM ORDER

Filed: July 17, 1991

APX. 1.

IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

THE MARYLAND
CLASSIFIED * NO. 50
EMPLOYEES
ASSOCIATION, * SEPT. TERM,
INC., et al. * 1991

and *

AMERICAN FEDERATION
OF STATE, COUNTY, *
AND MUNICIPAL
EMPLOYEES, COUNCIL *
92, MARYLAND
STATE EMPLOYEES *
UNION, et al. *

V. *

GOVERNOR WILLIAM
DONALD SCHAEFER *
et al. *

PER CURIAM ORDER

For reasons to be stated in an
opinion to be filed, it is this 17th day
of July, 1991

ORDERED, by the Court of
Appeals of Maryland, that the judgment of
the Circuit Court for Anne Arundel County
be, and it is hereby, affirmed. Costs in
this Court and in the Circuit Court for

Anne Arundel County to be paid by the
Petitioners. Mandate to issue forthwith.

/s/Robert C. Murphy
Chief Judge

APX. 3.

IN THE CIRCUIT COURT FOR
ANNE ARUNDEL COUNTY

MARYLAND CLASSIFIED * Case No.
EMPLOYEES ASSOCIATION,
INC., et al. * 3116305

Plaintiffs *

v. *

WILLIAM DONALD *
SCHAEFER, et al. *

Defendants *

* * * * * * * *
AMERICAN FEDERATION * Case No.
OF STATE, COUNTY AND
MUNICIPAL EMPLOYEES
COUNCIL 92, et al. * 3116596

Plaintiffs *

v. *

WILLIAM DONALD *
SCHAEFER, et al. *

Defendants *

*

MEMORANDUM OF OPINION AND ORDER

A hearing was held on Tuesday, July
2, 1991, on cross motions for summary

judgment in this consolidated action¹. Extensive memoranda have been submitted, stipulations have been entered and arguments were heard. Upon due consideration of the issues and arguments presented, this Court holds that there is no dispute as to any material issue of fact in this case and that as a matter of law the Defendant's motion for summary judgment must be granted for reasons that follow.

A. FACTS

On January 8, 1991, Governor William Donald Schaefer issued Executive Order 01-01-1991-01. That order provided that "the normal work week for State employee

APX. 5.

¹These cases were consolidated on motion of Plaintiff, AFSCME, by agreement between the parties and the court and by Order of this court signed on July 1, 1991.

be shall be 40 hours effective February 6, 1991 and that "the Secretary of Personnel and the appointing authorities shall take all actions necessary or desirable to implement this directive."² The effect of this order was to increase the work week from 35 1/2 hours to 40 hours for an estimated 38,700 employees. The Plaintiffs argue that the Governor's action was improper and unlawful under a number of theories:

- I. Separation of Powers
- II. Implied Contract
- III. Pay Plan Procedure
- IV. Procedural Due Process.

B. COURT'S OPINION

APX. 6.

²This Order was stayed by the Governor on February 6, 1991 and later amended by Executive Order 01.01.1991.15 on February 27, 1991 wherein the effective date was changed from February 6 to July 1, 1991.

I. SEPARATION OF POWERS

Plaintiff, Maryland Classified Employees Association (MCEA), argues that any attempt through an Executive order to change the work week would be an unconstitutional legislative act by the Governor. The basis for their portion is twofold: 1) the Governor is not specifically authorized by the constitution to 2) the legislature has mandated that the work week is to be 35 1/2 hours and that any time worked in excess of that amount, up to 40 hours, is to be compensated at the employee's usual rate and the action taken by the Governor is directly contrary to that mandate.

The first contention is easily disposed of by virtue of the fact that the Governor is specifically authorized, through the legislative grant of authority to the Secretary of Personnel, to control virtually all aspects of employment

including the work week for State employees in the Executive branch. The Governor is the head of the Executive branch of government and authorized to direct and supervise the officers of that branch.³ The Secretary of Personnel is an officer of the Executive branch and is appointed by and serves at the discretion of the Governor. The legislature has given this particular officer extremely broad power in matters concerning State personnel. Article 64A, §11 of the Annotated Code of Maryland provides that "It shall be the duty of the secretary to carry out the provisions of this Article, and to make such rules as he deems necessary or proper to that end. Such rules may be abolished, added to, changed or amended, and all such rules shall have

APX. 8.

³State Government Article, section 3-302, Annotated Code of Maryland.

the force and effect of law." Clearly, this grant of authority is broad enough to encompass something as basic as the number of hours in a work week. Thus, through his officer the, Secretary of Personnel, whom the Governor is empowered to direct and supervise, the Governor has authority to manipulate the work week. Furthermore the Plaintiff's assertion that Article 41, §3-401 does not encompass control over the State Employees work week is by necessity incorrect. The definition of an "Executive order" is broad and clearly must be read so as to allow the Governor to control and direct the officers over whom he is statutorily given control. Such breadth then will include the essential aspects of state employment such as hours in a work week.

MCEA's second position concedes that the Governor may have the power to take such action, but asserts that he cannot in

so acting interfere with existing law, There is no dispute that the Governor cannot by Executive Order undo what the legislature has done by statute, such action would be patently void and is not what has taken place in this instance. MCEA has seized upon Article 100, §76 of the Annotated Code of Maryland as the foundation from which to build this portion of their separation of power argument. While perhaps creative, this statute is not a sufficient foundation for such an argument. Article 100, §76 is a statute dealing with overtime compensation and provides in short that employees who work in excess of their normal work week, but less than 40 hours will be compensated at the usual hourly rate. Time worked over 40 hours will be compensated at time and one-half. From this simple statute MCEA finds a legislative mandate that the work week is to be 35 1/2 hours and that

any time worked in excess of that time must be compensated. However, in light of the statutory history behind the "normal work week" and the clear meaning of Article 100, §76 this statute cannot be a mandate and does not preclude the Governor's action.

The primary reason for the Court's position is that the legislature in enacting such a statute is presumed to be aware of existing law and regulations including administrative regulations.

Board of Education of Garrett County v. Lendo, 295 Md. 55 (1982); Maryland Port Administration v. Browner, 303 Md. 44, 60 (1985). In this instance there were regulations in existence that defined the "normal work week" to be not less than 35 1/2 hours and not more than 40 hours. Commissioner of Personnel's State Employees Personnel Rules, 42E. Had the Legislature intended a mandated 35 1/2

hour work week contrary to the existing regulations they could have provided so expressly. Therefore, since there is no mandate attached to Article 100, §76, MCEA's argument is meritless and the Governor's action is not in violation of the Doctrine of Separation of Powers. Furthermore, the Governor's action does not render the statute a nullity, for the statute remains perfectly valid unless the designation of the work week has been changed to 40 hours, as was done in this instance. The simple fact that the employees will not be able to take advantage of the statute does not render it a nullity since its usefulness was predicated upon the flexibility of the work week. In the future if the work week is reduced the statute will once again be controlling for hours worked in excess of the designated work week short of 40 hours.

II. IMPLIED CONTRACT

MCEA's second argument is that the Governor's action is void as a violation of the Plaintiff's implied contract with the State. MCEA asserts that the Plaintiff's were hired with the understanding that the work week was 35 1/2 hours and for the.. past several decades have worked 35 1/2 hour work weeks in reliance on that understanding. They argue that the State should be estopped from altering that relied upon understanding. In this instance no such contract could have been created. The Plaintiffs assert that their work week cannot be adjusted, but it is clearly stated in COMAR 06.01.01.42A(1)(a)-(f) that the "appointing authority shall designate the work week for all. positions under the appointing authority's control, and shall file the designation with the secretary. The designation of work week

hours is effective until the appointing authority changes it.,, Further, COMAR provides that the work week consists of at least 35 1/2 hours up to a maximum of 40 hours. In the face of these regulations it is inconceivable that any implied contract purporting to fix the work week could be validly made. Plaintiffs cannot claim that their employment was not and is not subject to the rules under which they were hired and such rules clearly preclude any notion that the work week is unalterably fixed. Indeed, the regulations clearly contemplate a flexible work week within the range set subject to change by the appointing authority. Therefore, any implied contract must necessarily exist within the frame work of the existing rules and regulations, which in this instance preclude the implication of a fixed work week. Further, had such a contract that irrevocably fixed the length

of the work week in fact been created, it would be void since "it would have surrendered an essential element of the State's sovereignty". Maryland State Teachers Association v. Hughes, 594 F. Supp. 1353 (D.Md. 1984), Affirmed, No. 84-2213 (4th Cir. 1985), Cert. denied, 475 U.S. 1140 (1986). in Hughes the Court held that a contract which deals with the level of compensation for State employees is one that one legislature can not create to bind a subsequent legislature. Compensation it was held, involves elements of a State's sovereignty which may not be contracted away. Like compensation, the terms of employment for State employees must also be within that realm of Governor's powers which cannot be given away or lost by a lack of enforcement or use. Were such not the case, the State would find itself without the power to control the terms of

employment with its own employees simply by virtue of the fact that a sufficient amount of time has passed since the employee was hired.

III. PAY PLAN PROCEDURE

Plaintiff, American Federation of State, County and Municipal Employees (AFSCME), raise the issue of the pay plan as a bar to the Governor I a action, AFSCME asserts that the State I s own salary plan requires that certain procedures and considerations are to be followed before employees salaries can be amended. However, before the pay plan argument can be used one must first assume that a change in the work week is a change in salary and that the other regulations as discussed above do not exist. The Court does not make such assumptions.

AFSCME argues that a change in the work week is a change in 7 the salary plan. However, the State employees are

salaried employees who are paid based upon the classification that they hold and not hourly employees. Thus, a change in the number of hours worked does not alter the salary they make or the amount of money the state must pay out from the state treasury. To be sure, the net effect of working more hours for the same pay on the individual level is a decrease in hourly pay, but such a decrease in "calculated" pay is not what the pay plan procedures were implemented for. The pay plan is a budgetary creature and is concerned with the "actual" payroll. Since the pay plan is not in fact altered the procedures it requires are not at issue.

AFSCME's argument is further undercut by the fact that the regulations allowing the work week to be altered at such time as the appointing authority changes the designation contemplate a change at any time and not one limited to the

appropriate time in the pay plan procedure. To read into the pay plan what AFSCME would require would be to limit the otherwise clear and controlling regulations on work week designations.

IV. DUE PROCESS

Plaintiff, MCEA, alleges that the Governor's action represents, a "taking" of the "property" interests of the State employees in contravention of their Due Process rights. The assertion is made that by increasing the number of hours worked without increasing compensation, the Governor is depriving them of their right to compensation without the traditional safeguards of Due Process: notice, hearing and an opportunity to be heard. However, for this argument to succeed, Plaintiffs must show that there was in fact a "taking" of a constitutionally protected "property" interest.

Under the Supreme Court's decision in Board of Regents v. Roth " property interests are "created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law - rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." ⁵ In Roth the Court looked to the contract of employment as the "rules or understanding" which may have created a "property interest" and the Court in Goldberg v. Kelly ⁶ looked to the statutory definitions as to eligibility to determine

APX. 19.

⁴408 U.S. 564, 33 L Ed. 2d 548, 92 S. Ct. 2701 (1972)

⁵408 U.S. 564, 577.

⁶397 U.S. 245, 25 L. Ed. 2d 287, 90 S. Ct. 1011.

that the welfare recipients indeed had a "property interest". In this case we have the existing and controlling regulations that clearly define what the work week is and that it is subject to change at the discretion of the appointing authorities. Far from creating an entitlement, the work week regulations affirmatively deny the creation of any property interest in a 35 1/2 hour work week.⁷

APX. 20.

⁷The Supreme Court in Perry v. Sindermann, 408 U.S. 593, 33 L Ed. 2d 570, 92 S. Ct. 2694 (1972) recognized that a prior course of dealing and the surrounding circumstances of employment could create an unwritten "common law" of that particular employment which might then rise to the level of a "property interest". However, the past conduct surrounding the employment of the Plaintiffs in this case can not displace the clear dictates of the controlling regulations that preclude the establishment of a fixed work week. See Perry, id., Footnote 7 at p. 602 where the

Therefore, since no property interest exists in this instance there can be no denial of Due Process.

ORDER

Now, Therefore, for reasons stated above, it is this 9th day of July, 1991, in the Circuit Court for Anne Arundel County,

ORDERED that:

1. The Defendant's Motion for Summary Judgment be, hereby, GRANTED;

2. The Plaintiffs' Motions for Summary Judgment are hereby, DENIED;

3. The Plaintiffs' request for injunctive relief is hereby, DENIED and

APX. 21.

court states that "If it is the law of Texas that a teacher in the respondent's position has no contractual or other claim to job tenure, the respondent's claim would be defeated."

4. Any and all further relief
requested by the Plaintiffs is hereby,
DENIED.

RAYMOND G. THIEME, JR., JUDGE /s/

APX. 22.

CONSTITUTION OF THE UNITED STATES

Section 10.
(Restrictions upon Powers of States)

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title or Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent

of Congress, lay any Duty of Tonnage, keep
Troops, or Ships of War in time of Peace,
enter into any Agreement of Compact with
another State, or with a foreign Power, or
engage in War, unless actually invaded, or
in such imminent Danger as will not admit
of delay.

APX. 24.

THE MARYLAND * IN THE
CLASSIFIED
EMPLOYEES * CIRCUIT COURT
ASSOCIATION,
INC., et al. * FOR

Plaintiffs * ANNE ARUNDEL CO.

V. * Case No. 3116305

WILLIAM DONALD *
SCHAEFER,
et al. *

Defendants *

* * * * *

AMERICAN *
FEDERATION OF
STATE COUNTY *
AND MUNICIPAL
EMPLOYEES *
COUNCIL 92, et al.

* Case No. 3116596

Plaintiffs

*

V.

*

WILLIAM DONALD
SCHAEFER,
et al.

*

Defendants

*

STIPULATIONS OF FACT

The parties agree to the following
facts:

1. Diana Phelps has been a

classified employee of the State of Maryland for 17 years, and is presently employed by the state as a Services Supervisor I within the Department of Transportation/Maryland Aviation Administration. Ms. Phelps is a member of the Maryland Classified Employees Associations. ("MCEA").

2. Theresa Whitmore has been a classified employee of the State of Maryland for 21.5 years, and is currently employed by the State of Maryland as an Office Secretary I within the Department of Health and Mental Hygiene. Ms. Whitmore is a member of MCEA

3 . Carol Kelly-Nesbitt has been a classified employee of the State of Maryland for 16 years , and is currently employed by the state as an Office Secretary II within the Department of Health and mental Hygiene. Ms. Kelly-Nesbitt is a member of MCEA.

4. Denise Kable has been a classified employee of the State of Maryland for 22 years, and is employed by the state as a Public Affairs Specialist III within the Department of Public Safety and Correctional Services. Ms. Kable is a member of MCEA.

5. Rommani Ammenu-El has been a classified employee of the State of Maryland for six years, and is currently employed by the state as a Support Enforcement Assistant IV within the Department of Human Resources. Mr. Ammenu-El is a member of MCEA.

6. Mildred Womble has been a classified employee of the State of Maryland for over 19 years. She is employed as a Cashier II with the Motor Vehicle Administration, Department of Transportation. Ms. Womble is a member of the American Federation of State, County and Municipal Employees Union ("AFSCME"),

Council 92.

7. Indra Pierce has been a classified employee for almost 12 years. She is employed as a Physical Therapist IV at the Rosewood Hospital Center, Department of Health and Mental Hygiene. Ms. Pierce Is a member of AFSCME Council 92.

8. Sylvia Seymour has been a classified employee for almost 21 years. She is employed as an Income Maintenance Specialist. She is a member of III by the Department of Human Resources. AFSCME Council 92.

9. Connie Powell has been a classified employee for almost six years. She is employed as an Office Clerk 11 by the State Highway Administration, Department of Transportation. Ms. Powell is a member of AFSCME Council 92.

10. Mary Cox has been a classified employee for almost eight years. She is

employed as an Addiction Counselor III by the Wicomico County Health Department, Department of Health and Mental Hygiene. Ms. Cox is a member of AFSCME Council 92.

11. Mary Hall has been a classified employee of the University of Maryland System for over one year. She is employed as a Library Assistant I by the University of Maryland, Baltimore County. Ms. Hall is a member of AFSCME Council 92.

12. Nancy Brant has been a classified employee for over seven years. She is employed as an Office Secretary I by the Thomas B. Finan Center. Ms. Brant is a member of AFSCME Council 92.

13. Sally K. Davies has been a classified employee of the University of Maryland for over 17 years. She is employed as an Office Supervisor III at the University of Maryland, University College, University of Maryland System. Ms. Davies is president of AFSCME Local

1072.

14. On January 8, 1991, Governor William Donald Schaefer issued Executive Order 01.01.1991.01.

15. On February 6, 1991, Governor Schaefer suspended Executive Order 01.01.1991.01.

16. On February 27, 1991, Governor Schaefer issued Executive Order 01.01.1991.15.

17. 33,438 State employees in the executive branch work 35 1/2 hour work weeks, 21,175 state employees in the executive branch work 40 hour work weeks. In the University of Maryland System, 5,083 employees presently work 40 hours per week and 5,262 employees work fewer than 40 hours per week.

18. Presently, employees of the Maryland executive branch and in the University of Maryland System whose work weeks have been designated as 35 1/2 hours

earn, when approved by the appropriate supervisor, cash overtime or compensatory leave for hours worked in excess of 35 1/2 hours per week.

19. Each of the named plaintiffs, with the exception of Diana Phelps during her employment as a correctional officer, has worked 35 1/2 hour work weeks since the inception of their employment with the State.

20. Exhibits B through E, attached to the complaint of Plaintiffs MCEA, et al. are true and correct documents and accurately state the present policies of the identified agencies regarding the work weeks and overtime compensation applicable to the employees to whom the documents are addressed.

21. Employees in the merit system are paid on an annual salary basis.

22. All appointing authorities in the merit system have filed with Secretary

of Personnel Hilda E. Ford work week designations of 40 hours for all of their employees, effective in July 1991, pursuant to the request of Secretary Ford of May 3, 1991.

23. There are 442 classifications in the merit system containing positions in which employees work between 71.0 and 80 hours per two week pay period. In those classifications, 8,408 employees work 40 hour work weeks and 19,713 work 35 1/2 hour work weeks.

24. In establishing the rates of pay for the classification In the State Salary Plan, the hours worked by employees are not taken Into consideration.

25. Employees with designated normal work weeks of 40 hours receive the same salaries as employees In the same classification whose normal work weeks are 35 1/2 hours.

26. On September 25, 1945, the Board

of Public Works approved a five day work week for State departments generally. The work weeks for such employees were 35 1/2 hours. The Board's action did not apply to State hospitals or Institutions.

27. On May 14, 1956, the Board of Public Works approved a proposal by the Commissioner of Personnel to establish a normal work week of 40 hours for institutional employees other than off ice workers and a normal work week of not less than 35 1/2 hours for Institutional office employees and employees of general state departments.

28. Rule 42E of the State Employees Personnel Rules, promulgated by the Commissioner of Personnel, provided between 1960 and 1970 that the normal work week for institutional employees other than office workers wag 40 hours. Rule 42E also provided that for institutional office employees and all employees of

general state departments the normal work week consisted of not less than 35 1 /2 hours or more than 40 hours

29. Effective July 1970 the Secretary of Personnel amended Rule 42E to provide that based on the needs of the agency, an appointing authority could designate the normal work week for the various positions in the agency, which would consist of not less than 35 1/2 hours per week, nor more than 40 hours per week.

30. In 1986, when the State requested a comparable worth study, Booze Allen and Hamilton, Inc. adjusted the salaries studied to the same number of work week hours.

31. The Salary Survey performed by Local Government Personnel Association National Capital Area for FY 1990-1991, making comparisons of the University of Maryland System to other public sector

groups, was done on an hourly basis.

32. Secretary Hilda E.- Ford, reported no amendments to the pay plan to the General Assembly in January of 1991.

33. Exhibits I through 25 to Defendants' Motion for Summary Judgment are genuine, authentic, and, to the extent found relevant by this Court, admissible

34. Exhibits 1 though 6 of Plaintiffs AFSCME Council 92's and AFSCME Local 1072's Statement of Grounds and Authorities are genuine, authentic, and, to the extent found relevant by this Court, admissible.

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Attorney for Defendants

APX. 36.

THE MARYLAND * IN THE
CLASSIFIED * CIRCUIT COURT
EMPLOYEES * FOR
ASSOCIATION, INC. * ANNE ARUNDEL CO.
7127 Rutherford Rd *
Balto., Md. 21207 *
DIANA PHELPS *
345 Rambling *
Ridge Court *
Pasadena, Md. 21122 *
TERESA WHITMORE *
23 East 9th Street *
Frederick, *
Maryland 21701 *
CAROL KELLY-NESBITT *
P.O. Box 1319 *
Salisbury, Maryland 21802 *
DENISE KABLE *
887 Century Street *
Hempstead, Maryland 21074 *
ROMMANI AMENU-EL 1405 *
Vida Drive *
Balto., Md. 21207 *
Plaintiffs - *
Individually, *
and as Represen- *
tives of a Class of *
All Similarly-Situated *
State Employees *
V. *

WILLIAM DONALD *
SCHAEFER, GOVERNOR OF
MARYLAND *
State House
Annapolis, Md 21401 *

and *

THE STATE OF MARYLAND
State House *
Annapolis, Maryland
21401 *

and *

HILDA E. FORD *
Secretary of
Personnel *
301 W. Preston St.
Room 609 *
Balto, Md. 21201 *

SERVE ON:

Judson P. Garrett,
Jr. *
Office of the
Attorney General *
200 St. Paul Place
Baltimore, Maryland *
21202
On Behalf of All *
Defendants *

**COMPLAINT FOR DECLARATORY
JUDGMENT AND DAMAGES**

Plaintiffs, The Maryland Classified
Employees Association, Inc., Diana Phelps,
Teresa Whitmore, Carol Kelly-Nesbitt,

Denise Kable and Rommani Amenu-El, individually, and as representatives of a class of all similarly situated State employees ("Plaintiffs"), by their attorneys, J. Edward Davis, J. Calvin Jenkins, Jr., Stephen B. Awalt and Davis & Jenkins, bring this action against the Defendants, and in support thereof state:

I. INTRODUCTION

On February 27, 1991, Governor William Donald Schaefer issued Executive Order 01.01.1991.15 (the "Order") requiring State employees to work a 40 hour workweek, effective July 1, 1991 (Exhibit A). The Order assumes that State employees do not work a 40 hour workweek, that increasing the workweek will lower State expenditures for labor, that State employees do not work as hard, or as long as employees in the private and federal sector, and that State employees are unwilling or unable to protect themselves

from the unilateral disruption of their employment rights by the Governor. Because State employees are currently required to be at the work place at least 40 hours per week, because they often work more than the hours required, because increasing the length of the work week will cost the State more money in salary payments, retirement earnings and benefits accumulation, and because State employees are empowered by law to seek redress from the devaluation of their work, this action. is brought to require.the State of Maryland, the Governor of Maryland, and the Secretary of Personnel to honor the laws, rules, regulations and policies governing the State as an employer.

II. FACTS COMMON TO ALL COUNTS

1. The Maryland Classified Employees Association, Inc. is an employee association, representing over twenty-- eight thousand active and retired state

and local government employees throughout the State of Maryland. Each of the named Plaintiffs is a member of the Maryland Classified Employees Association, Inc.

2. Plaintiff Diana Phelps has been a classified employee of the State of Maryland for 17 years, who will be required to work 40 hours for 35 and 1/2 hours' pay by virtue of the Order. Diana Phelps is employed by the State as a Customer Service Representative within the Department of Transportation - Maryland Aviation.

3. Plaintiff Teresa Whitmore has been a classified employee of the State of Maryland for 21.5 years, who will be required to work 40 hours for 35 and 1/2 hours' pay by virtue of the Order. Teresa Whitmore is employed by the State as an Office Secretary I within the Department of Health and Mental Hygiene.

4. Plaintiff Carol Kelly-Nesbitt has

been a classified employee of the State of Maryland for 16 years, who will be required to work 40 hours for 35 and 1/2 hours' pay by virtue of the Order. Carol Kelly-Nesbitt is employed by the State as an Office Secretary II within the Department of Health and Mental Hygiene.

5. Plaintiff Denise Kable has been a classified employee of the State of Maryland for 22 years, who will be required to work 40 hours for 35 and 1/2 hours' pay by virtue of the Order. Denise Kable is employed by the State as a Public Affairs Specialist III within the Department of Public Safety and Correctional services.

6. Plaintiff Rommani Amenu-El has been a classified employee of the State of Maryland for 6 years, who will be required to work 40 hours for 35 and 1/2 hours' pay by virtue of the Order. Rommani Amenu-El is employed by the State as a Support

Enforcement Assistant Supervisor within the Department of Human Resources.

7. The named Plaintiffs represent approximately 40,000 similarly-situated State employees, all of whom will be required to work 40 hours for 35 and 1/2 hours of pay as a result of the Order. Joinder of this number of Plaintiffs is impracticable.

8. There are questions of law and fact common to the class, specifically:

(a) All the individual Plaintiffs and potential class members are affected by the same Order;

(b) All the individual Plaintiffs and potential class members are classified employees;

(c) All the individual Plaintiffs and potential class members are entitled to the same rights under the Constitution of Maryland, the Maryland Declaration of Rights, the Merit System Law, the

Annotated Code of Maryland and COMAR; and

(d) The Defendants' defenses, if any, will be the same as to all Plaintiffs in the class.

9. The claims and defenses of the representative parties are typical of the claims and defenses of the class.

10. The representative parties will fairly and adequately protect the interests of the class. -

11. The questions of law common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of this controversy.

12. The Defendant, William Donald Schaefer, is the Governor of Maryland ("the Governor"), the Chief Executive of the State of Maryland and the source of the Order.

13. The State of Maryland ("the State") is the employer of all of the Plaintiffs.

14. Hilda E. Ford is the Secretary of Personnel ("the Secretary"), and is charged with the duty of administering personnel policy in the State of Maryland, and is charged with the implementation of the Order.

15. Collectively, the Defendants are all persons known to the Plaintiffs who have or claim any interest which would be affected by the declaratory decree sought to be obtained in these proceedings.

B. Legal and Factual Background

16. The Code of Maryland Regulations ("COMAR defines the workweek as work days, and at least 35 1/2 hours up to a maximum of 40 hours." The appointing authority has the authority to designate the workweek for all positions under the appointing authority's control. COMAR

06.01.01.42.A.(1). The Governor is not the appointing authority within State Agencies or Departments. (See, Md. Health General Code Ann. §2-103(b)(3) (Health and Mental Hygiene the Department Secretary); Md. Ann. Code Art. 27 684(b) (Public Safety and Correctional Services - the Warden or Superintendent).

17. With few exceptions, the appointing authorities for every Executive Branch department have designated 35-1/2 hours as the normal workweek for employees under their authority. This has been the policy of the State for many years.

(a) Exhibit B - Department of Public Safety and Correctional Services;

(b) Exhibit C - Department of Human Relations.

(c) Exhibit D - Public Defender's Office.

(d) Exhibit E - Department of Health and Mental Hygiene.

18. The Annotated Code of Maryland,
Article 100, §76, provides, in part:

(a) Employees generally. - Except as otherwise provided in this section, every State employee who works in excess of the normal work week for his department, bureau, board, commission or agency shall receive extra compensation for such hours worked in excess of that time. The amount of compensation for such excess hours shall be computed in the following manner

(1) Payment for time worked in excess of the position's normal workweek but not in excess of 40 hours shall be made at the employee's usual hourly rate or rates.

(2) Payment for time worked in excess of 40 hours in any week shall be made at time and one-half the employee's regular hourly rate. The regular hourly rate for the week is determined by dividing the total regular pay for all hours worked in the week by the total hours worked.

19. Through Article 106, §76, the State is required to pay State employees their usual hourly rate for all those hours worked in excess of normal workweek, 35.5 hours.

20. By virtue of the Order, the Governor is attempting to circumvent this law, and require State employees to work an additional 4.5 hours, without paying the additional regular rate as required by Art. 100, §76.

21. The Governor has no power, absent legislative approval, to make changes that are inconsistent with existing law, without specific legislative authorization. Const. of Md., Art. II, § 24.

22. The Governor has not sought legislative approval of the order.

23. The Order completely disregards the law of wages and overtime for State employees, found in Article 100, §76.

24. The Order deprives the Plaintiffs of their property in violation of the United States Constitution, 14th Amendment, the Maryland Declaration of Rights, Art. 8, 9 and 24, and the Constitution of Maryland, Art.II §24.

III. CLAIM FOR DECLARATORY RELIEF

25. The Plaintiffs incorporate and allege the facts stated in Paragraphs 1 through 24 as if fully set out and alleged herein.

26. This action is brought to obtain declaratory and other relief pursuant to the provisions of the Annotated Code of Maryland, Cts. & Jud. Proc. Art. § 3-401, et seq., Md. R. 2-231 and the Public General laws of the State of Maryland.

27. This action is brought to determine whether the Governor's Executive Order 01.01.1991.15 requiring State employees to work 40 hours per week for 35

and 1/2 hours of pay, is a valid and lawful Order under the Constitution, Declaration of Rights, laws and regulations of the State of Maryland and the United States.

28. An actual controversy exists between the Plaintiffs and the Defendants on the issue of whether the Order complies with the United States Constitution, the Maryland Declaration of Rights, the Maryland constitution, and the Public General Laws of the State of Maryland.

29. A declaration by this Court will serve to terminate uncertainty and controversy giving rise to this proceeding, specifically, Plaintiffs assert that their salaries and hours of work are controlled by law, and the Defendants seek to change the salaries and hours in violation of the laws of the State of Maryland.

WHEREFORE, the Plaintiffs request

APX. 50.

that this Honorable Court declare:

(A) That the Executive Order, No. 01.01.1991.15 be declared void ab initio;

(B) That the Plaintiffs, if they are to work in excess of 35-1/2 hours per week, be fully entitled to and receive the wages and benefits guaranteed them by law and regulation;

(C) For the costs and expenses, including attorney's fees incurred in bringing this action; and

(D) For such other and further relief as may be just and equitable in support of the Plaintiffs' cause.

**IV. VIOLATION OF PLAINTIFFS'
CIVIL RIGHTS**

30. The Plaintiffs incorporate and allege the facts set forth in Paragraphs 1 through 29 as if fully stated herein.

31. The Plaintiffs, as classified employees, have a property right in their

employment. This property cannot be taken from them without due process of law, in accordance with the United States Constitution, 5th Amendment, the Maryland Declaration of Rights, Art. 24, Annotated Code of Maryland, Art. 100, §76 and COMAR 06.01.01.42.

32. The Defendants seek to deprive the Plaintiffs their wages by requiring them to work greater hours without additional pay or benefits.

33. The Maryland Declaration of Rights, Art. 8, guarantees that the legislative, executive and judicial powers of government will be separate and distinct and that no person exercising the function of one of those departments may assume or discharge the duties of any other. In enacting and attempting to enforce the Order, the Defendants, members of the Executive Branch of government, seek to execute legislative functions,

specifically the regulation of overtime pay in conflict with the legislature's prior actions under Art. 100, 76.

34. Article 9 of the Maryland Declaration of Rights guarantees that only the legislature has the power to suspend the laws of the State, or to grant that power; the Order seeks to suspend the laws of the State of Maryland without legislative grant.

35. Article 17 of the Maryland Declaration of Rights guarantees that the State shall not enact any retroactive laws.

36. Plaintiffs, having accepted jobs with compensation established on a 35 1/2 hour workweek, having worked at those jobs -- for many years, having made child care, home and family commitments based on the State's promise of a 35 1/2 hour workweek, have acquired a vested right under existing law, regulation and policy in the

continuation of a 35 1/2 hour workweek, and compensation for hours worked in excess of 35 1/2 hours.

37. The Order, requiring Plaintiffs to work 225 extra hours per year without additional compensation deprives the Plaintiffs of their vested employment rights, and hence violates the Maryland Declaration of Rights, Art. 17, and the United States Constitution, Article I, §10.

WHEREFORE, the Plaintiffs request:

- (A) Damages in an amount to be determined at trial;
- (B) Costs and attorney's fees incurred in bringing this action; and
- (C) For such other and further relief as the nature of their cause may require.

V. BREACH OF CONTRACT

38. The facts and allegations stated

in Paragraphs 1 through 37 are alleged and incorporated as if fully stated herein.

39. The Plaintiffs were offered, and accepted positions with a salary based on a 35-1/2 hour workweek, with overtime or compensatory time, as required by law, for all hours worked in excess of 35-1/2 hours.

40. For over many years, the Plaintiffs have worked a 35-1/2 hour week, and been paid overtime or compensatory time for all those hours worked in excess of 35-1/2 hours per week.

41. The Plaintiffs have relied to their detriment on the promise of the Defendants that they would be required to work only 35-1/2 hours per week, and many of the Plaintiff class have built lives, homes and families, child-care or parent-care arrangements based on the promises by the State.

42. The Plaintiffs by virtue of the

laws of the State of Maryland have an expressed and implied contract of employment with the State that guarantees their salary, wages and hours of work under the terms set out in Art. 64A, Art. 100 and COMAR.

43. The Defendants' action increasing the hours without a proportionate increase in salary constitutes a breach of the Plaintiffs' contract.

44. As a result of this breach, the Plaintiffs will sustain monetary and non-monetary damages.

WHEREFORE, the Plaintiffs request:

- (A) Damages in an amount to be determined at trial;
- (B) Costs and attorney's fees incurred in bringing this action; and
- (C) For such other and further relief as the nature of their cause may require.

VI. VIOLATION OF RULE-MAKING AUTHORITY

45. The facts stated in Paragraphs 1 through 44 are incorporated and alleged as if fully set forth herein.

46. The workweek for State employees is described in regulation, specifically COMAR 06.01.01.42A.

47. The regulations found in COMAR have been established through the rule-making authority granted by the Legislature to the Administrator of State Documents and the Joint Committee on Administrating, Executive and Legislative Review. Md. St. Gov't Code Ann. §10-101 et. seq.

48. Regulations may be changed or adopted only after review by the Attorney General, publication in the Maryland Register, notice of proposed adoption, opportunity for public comment, public hearing and other requirements under Md. St. Gov't Code §10-101 et. seq.

49. The Governor has not subjected

his proposed changes to COMAR to the rule-making procedure established in the State Government Article.

50. By enacting the order, the Governor has attempted to circumvent the rule-making procedure established by the Legislature, in violation of the Maryland Declaration of Rights, Articles 8 and 9.

WHEREFORE, the Plaintiffs request that this Court:

- (A) Declare the Order void ab initio;
- (B) Award the Plaintiffs damages in an amount to be determined at trial;
- (C) Award the Plaintiffs attorney fees and costs incurred in bringing this action; and
- (D) For such other and further relief as the nature of this case may require.

J. EDWARD DAVIS

J. CALVIN JENKINS, JR.

STEPHEN B. AWALT

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ATTORNEYS FOR PLAINTIFF

APX. 59.

IN THE COURT OF APPEALS
FOR THE STATE OF MARYLAND

THE MARYLAND * Sept. Term
CLASSIFIED
EMPLOYEES * Misc. No.
ASSOCIATION,
INC., et al. *

Plaintiffs

V_s

GOVERNOR WILLIAM
DONALD SCHAEFER,
et al.

Defendants

AMERICAN FEDERATION
OF STATE, COUNTY AND
MUNICIPAL EMPLOYEES,
COUNCIL 92, MARYLAND
STATE EMPLOYEES
UNION, et al.

Plaintiffs

Y₂ = 1.0000000000000002

GOVERNOR WILLIAM
DONALD SCHAEFER,
et al.

Defendants

**PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS**

Plaintiffs. Maryland Classified

Employees Association, Inc., et al., and AFSCME, et al. request this Court to issue a Writ of Certiorari.

The Case in The Lower Court

The case in the lower court was designated

Maryland Classified Employees Association, Inc. et al., Plaintiffs v. Governor William Donald Schaefer, et al., Defendants and American Federation of State, County and Municipal Employees, Council 92, Maryland State Employees Union, et al., Plaintiffs v. Governor William Donald Schaefer et al., Defendants in the circuit Court for Anne Arundel County, consolidated case numbers 3116305 and 3116596.

Decision by The Court of Special Appeals

The Judgment sought to be reviewed was entered on July 9, 1991 by the Circuit Court for Anne Arundel County. The

Plaintiffs, Maryland Classified Employees Association, et al. filed an Appeal to the Court of Special Appeals on July 94, 1991. The case has not been decided by the Court of Special Appeals and the is the subject of this Petition.

Questions Presented for Review

1. Whether the Governor's Executive Order

requiring the Plaintiffs to work a 40 hour work week without additional compensation violates the doctrine of Separation of Powers.

2. Whether the Governor's Executive Order requiring the Plaintiffs to work a 40 hour work week without additional compensation violates the Plaintiffs' contract rights.

3. Whether the Governor's Executive Order requiring Plaintiffs to work a 40 hour week without additional compensation violates the

Plaintiffs' procedural due process rights.

4. Whether the Governor's Executive Order requiring Plaintiffs to work a 40 hour work week without additional compensation violates the State's Pay Plan Law.

Pertinent Legal Provisions

1. Constitution of Maryland, art. 1.
2. Constitution of Maryland, art. 2,
§24.

3. Annotated Code of Maryland, art.
100,
§76.

4. Maryland State Government Code
Annotated §7-213.

5. Maryland Declaration of Rights,
art. 8, 9.

6. Code of Maryland Regulations
06.01.01.42.

7. Maryland Declaration of Rights,
art. 17.

8. United States Constitution, art.

I, §10.

9. Maryland Code, art. 64A, §27.

Statement of Facts

See the Stipulation of Facts agreed to by the parties, attached hereto as Exhibit A.

Argument

The Plaintiff, MCEA, et al. believes that this case is of monumental significance to the State because the Court's ruling will impact on tens of thousands of State employees and their families. The issues presented concern the MCEA's contention that the Defendants have violated provisions of the Constitution of Maryland, the Maryland Bill of Rights, Code of Maryland Regulations and various statutes of the Annotated Code of Maryland, as well as the United States Constitution. The Plaintiff, MCEA, et al. avers that the decision of the trial court misconstrued

the Defendant Schaefer's powers under the doctrine of Separation of Powers mandated by the Constitution of Maryland, failed to recognize the contractual relationship between the individual Plaintiffs and the Defendants and failed to comply with the Regulations of the State Pay Plan, and was otherwise in error. The issues presented on Appeal are of such significance that the Court of Appeals of Maryland should directly consider this Appeal.

WHEREFORE, the Plaintiffs, MCEA, et al., Petition this Court to grant a Writ of Certiorari in this case.

RESPECTFULLY SUBMITTED,

EDWARD DAVIS

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ATTORNEYS FOR AFSCME, et al.

APX. 66.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on this 9th day of July, 1991, that a copy of the foregoing Writ of Certiorari was mailed postage prepaid to: David Dufee, Department of Personnel, Suite 1009, 301 W. Preston Street, Baltimore, Maryland 21201, Judson Garrett, Deputy Attorney General, 200 St. Paul Place Baltimore, Maryland 21202 and William Engleman, 20 S. Charles Street, 10th Floor, Baltimore, Maryland 21201.

EDWARD DAVIS

APX. 67.

EXECUTIVE ORDER

01.01.1991.15

40 Hour Work Week

(Amends 01.01.1991.01)

WHEREAS, Executive Order 01.01.1991.01, issued on January 8, 1991, proclaimed a standardized work week of 40 hours for State employees; and

WHEREAS, The federal government, most private and public sector employees, and one-third of State employees presently work 40 hours a week; and

WHEREAS, A 40 hour work week for State government will achieve cost containment through increased productivity and employee development; and

WHEREAS, During these difficult fiscal times, it is prudent to search for savings for the taxpayers of this State; and

WHEREAS, The transition to a standardized 40 hour work week for State employees could involve changes and adjustments to daily schedules and routines, particularly child care, transportation, employment, and family responsibilities; and

WHEREAS, These considerations in addition to many question involving the implementation of Executive Order 01.01.1991.01 at the State level, make it prudent to delay the implementation of the 40

hour work week so that, when effective, the transition will not cause hardship or inconvenience;

NOW, THEREFORE,

I, WILLIAM DONALD SCHAEFER, GOVERNOR OF THE STATE OF MARYLAND, BY VIRTUE OF THE AUTHORITY VESTED IN ME BY THE CONSTITUTION AND LAWS OF MARYLAND, HEREBY PROCLAIM THE FOLLOWING ORDER AMENDING EXECUTIVE ORDER 01.01.1991.01:

A. The normal work week for State employees shall be 40 hours effective [February 6, 1991] JULY 1, 1991.

B. The Secretary of Personnel and the appointing authorities shall take all actions necessary or desirable to implement this directive.

GIVEN Under My Hand and the Great Seal of the State of Maryland, in the City of Annapolis, this 27th day of February 1991.

WILLIAM DONALD SCHAEFER, GOVERNOR /s/

ATTEST:

WINFEILD M. KELLY, /s/
SECRETARY OF STATE

APX. 69.

Annotated Code of Maryland, Art. 100 §76.

Overtime Compensation of Employees.

(a) **Employees Generally** - Except as otherwise provided in this section, every State employee who works in excess of the normal work week for his department, bureau, board, commission or agency shall receive extra compensation for such hours worked in excess of that time. The amount of compensation for such excess hours shall be computed in the following manner:

(1) Payment for time worked in excess of the position's normal work week but not in excess of 40 hours shall be made at the employee's usual hourly rate or rates.

(2) Payment for time worked in excess of 40 hours in any week shall be made at time and one-half the employee's regular hourly rate. The regular hourly rate for the week is determined by dividing the total regular pay for all hours worked in the week by the total hours worked.

(3) For employees of hospitals and domiciliary care facilities for the ill, aged, or handicapped, payment may be computed on the basis of an 80-hour biweekly period in lieu of a 40-hour workweek. Payment shall then be made at time and one-half the employee's regular rate for all hours worked in excess of 80 hours in the biweekly period, or at time and one-half the regular hourly rate for all hours worked in excess of 8 hours each day, whichever is greater. The

regular hourly rate is determined as in paragraph (2), but used for the two week period.

(4) The Secretary of Personnel may, by regulation consistent with the Fair Labor- Standards Act, provide for payment to be made in compensatory time rather than by monetary payment.

(5) Regulations adopted under paragraph (4) of this Subsection shall include:

(i) Provisions which specify the ability of the employee to choose, prior-to the performance of the work and after notifying the appropriate supervisor, whether to receive compensatory time for the approved overtime work. If the employee does not choose to receive compensatory time, the employee will - automatically receive overtime payment calculated under this section for approved overtime work.

(ii) Provisions specifying that compensatory time received by an employee under this section, in lieu of a

monetary overtime payment, may not be less than one and one-half hours of compensatory time for each hour of overtime worked.

(b) **Payment** - A State employee who earns overtime pay shall receive that overtime pay no later than the day of payment of the 2nd pay period following the pay period during which the overtime pay is earned.

(c) **Supervisory Employees** - The Secretary of Personnel is authorized and empowered to designate those bona fide administrative, executive, and professional employees who shall not be eligible to receive overtime compensation but who may be compensated by compensatory time. The Secretary of Personnel is authorized and empowered to adopt and promulgate reasonable regulations to prevent an abuse of this section by the granting of unnecessary and unwarranted overtime or by the failure to grant overtime compensation when the employee is eligible to receive it under the provisions of this section.

(d) **Exceptions** - The provisions of this section shall not apply to the law enforcement personnel of the Maryland Alcohol and Tobacco Tax Enforcement Unit.

(1) An agency may adopt alternate work schedules as permitted by the Fair Labor Standards Act for the purpose of determining overtime compensation for its law enforcement employees or fire fighters.

(2) A law enforcement employee of the Maryland State Police holding a noncommissioned rank or a law enforcement employee of the Department of Natural Resources holding the rank of Sergeant or below or Park Ranger III or below, who is called out to duty on a regularly scheduled off-duty day or during a regularly scheduled on-duty day after going off duty shall be compensated at one and one-half times the employee's regular hourly rate. This payment shall be made for not less than four hours time on any day the employee is called out. A law enforcement employee of any other State agency who is called out to duty on a regularly scheduled off-duty day shall be compensated at one and one-half times the employee's regular hourly rate for the time worked.

(3) A law enforcement employee of the Maryland State Police holding a noncommissioned rank or a Natural Resources police officer of the rank of Sergeant or below who appears in court on official duty on a regularly scheduled off-duty day or during a regularly scheduled on-duty day after going off duty shall be compensated at one and one-half times the employee's regular hourly rate. This payment shall be made for not less than two hours time on any day the employee is called out.

(e) **Law Enforcement Employees** - (1) Law enforcement employees and cadets of the Maryland State Police who work in excess of their normal 8-hour daily workday and law enforcement employees of any other State agency who work in excess of their normal 8-hour daily workday shall receive overtime compensation at

one and one-half times their respective hourly wage rates,

(2) The maximum yearly overtime to be paid any 1 employee of the Maryland State Police or the Department of Natural Resources is as follows:

Cadet, Maryland State Police	Unlimited
and Department of	
Natural Resources	
Trooper, Trooper First Class,	
Natural Resources	
Officer and	
Officer,	
First Class	Unlimited
Corporal and Natural	
Resources Corporal	Unlimited
Sergeant and Natural	
Resources	
Sergeant	Unlimited
1st Sergeant	Unlimited
Park Ranger I	Unlimited
Park Ranger II	Unlimited
Park Ranger III	Unlimited

(3) Funds, other than those designated out of the general funds of the State, which are allocated for federal, county, or municipal sources, or from State special fund sources, may be used to pay overtime to law enforcement employees and cadets of the Maryland State Police holding a noncommissioned rank or of the Department of Natural Resources whether or not the maximum limits for each rank listed above have been paid. A commissioned officer in the State Police or an officer of the Department of Natural Resources above the rank of Sergeant or above the rank of Park Ranger III is not entitled to

receive overtime compensation in any case, except that compensatory time may be awarded for overtime performed by a commissioned officer of the State Police or of the Department of Natural Resources in excess of 30 hours per fiscal year.

(4) If any employee's rank is changed during the year, the employee shall be entitled to the higher of the two applicable yearly overtime maximums for the duration of the year. Overtime payments may not be taken into consideration for retirement or pension purposes,

(5) Any law enforcement employee of the Department of Natural Resources who for any reason works any overtime, whether or not the officer is paid monetary overtime compensation for that time, shall be considered to be employed by the State during those hours for purposes of all other employee entitlement. Commissioned officers may be awarded compensatory time for overtime performed in excess of 30 hours per fiscal year.

(6) Law enforcement employees of the Maryland State Police holding a noncommissioned rank who are required to work on any portion of the New Year's Day, Thanksgiving Day, or Christmas Day holiday shall receive overtime compensation that is computed by:

(i) Receiving a compensatory day off; and

(ii) Dividing the normal daily rate of compensation by the number of hours in the workday and multiplying the resulting quotient by one and one-half times the number of hours worked during the holiday.

APX. 76.

Annotated Code of Maryland Art. 64A, §56.

Sovereign immunity; satisfaction of awards.

(a) **"State" Defined** - In this section the "State" includes any officer, department, agency, board, commission, appointing authority, or, other unit of State government.

(b) **Defense of Sovereign Immunity Unavailable** - The defense of sovereign immunity may not be available to the State, unless otherwise specifically provided by the laws of Maryland, in any administrative, arbitration, or judicial proceeding held pursuant to this article, to the rules and regulations of the Secretary of Personnel, or the personnel policies, rules, and regulations for classified employees of the University of Maryland System involving any type of employee grievance or hearing, including, but not limited to, charges for removal, disciplinary suspensions, involuntary demotions, or re-classifications. The defense of sovereign immunity is not available to the State with regard to a salary award in an employment discrimination case under SS 16 of Article 49B of this Code.

(c) **Funds Provided for Satisfaction of Awards** - The Governor shall provide in the annual State budget adequate funds for the satisfaction of any final monetary or benefit award or judgment, which has been rendered in favor of the person against the State in any administrative, arbitration, or judicial proceeding.

(d) Awards Which Have Not Been Satisfied - Awards under this section which have not been satisfied pursuant to subsection (e) of this section, shall be reported to the Comptroller of the Treasury, who shall maintain and report annually to the Governor an accounting of existing awards. Upon appropriation of funds by the legislature, the Comptroller of the Treasury shall satisfy existing awards in order of date of award.

(e) Timeliness of Satisfaction - If the State has sufficient funds available to satisfy any award under this section at the time the award is rendered, the award shall be satisfied as soon as practicable but not more than 20 days after the award becomes final.

APX. 78.

Code of Maryland Regulation,
06.01.01.42A.

Preface

Paragraph One. This regulation applies to all employees and appointed officials except employees of the offices of clerks of the court and registers of wills.

Paragraph Two. Faculty and administrative employees of the University of Maryland and colleges under the authority of the Board of Trustees of State Colleges are encompassed under the existing policies and procedures established by these authorities. Any amendments or changes to these policies and procedures shall be filed with, and approved by, the Secretary of Personnel.

Paragraph Three. An employee may not be granted provisions of leave in tile establishment of official records which would exceed the maximum earnings rates and accumulation of those stipulated in Article 64A and this regulation for any given time period.

(a) Workweek, Overtime, and Compensatory Leave of 5 work days, and at least 35 1/2 hours up to a maximum of 40 hours.

(b) The part-time workweek consist, of at least 2 work days, and at least 17 3/4 hours up to a maximum of 32 hours.

(c) The workweek begins on Wednesday and ends on the following Tuesday, both days inclusive. The appointing authority

may designate a different 7-day period for the purpose of computing overtime.

(d) The appointing authority shall designate the workweek for all positions under the appointing authority's control, and shall file the designation with the Secretary. The designation of work week hours is effective until the appointing authority changes it.

(e) The appointing authority may designate a full-time workweek which consists of fewer than 5 days, and at least 71 hours in a 2-week pay period up to a maximum of 80 hours in a 2-week pay period, and which is known as a compressed work week. The appointing authority shall submit to the Secretary a request for approval of the designation together with the reason for the designation.

(f) Work in excess of a position's normal workweek shall be compensated by overtime payments in accordance with Regulation .14D of this chapter or may be compensated by compensatory leave.

(2) Work Time.

(a) Work time includes time during which an employee:

(i) Is required to be on duty;

(ii) Is on paid leave;

(iii) Participates in training activities as part of his job duties;

(iv) Is on the employer's premises and is on call and waiting for work;

(v) Is not on the employer's premises, but is on call and waiting for work, and the employee's personal activities are substantially restricted;

(vi) Is changing into and removing program specified clothing and equipment necessary for the performance of his job activities;

(vii) Participates in activities that are job-related immediately before the beginning of his shift or immediately after the end of his shift;

(viii) Travels to and from work when he has been recalled to work by the appointing authority or his designated representative after the employee has completed his normal workday; and

(ix) Travels between his home and a work site other than his assigned office, in accordance with the Standard Travel Regulations.

(b) With the exception of those categories of employees cited in the Fair Labor Standards Act, 29 U.S.C., SS201, et seq., an appointing authority may exclude meal periods and a maximum of 8 hours sleep from consideration as work time for employees who are on duty for at least 24 hours. If the employee's sleep is interrupted for the performance of work so that he is not able to sleep continuously for at least 5 hours, the appointing authority shall consider the entire period of sleep up to a maximum of 8 hours as work time.

(3) Authorization to Work Overtime.

(a) An appointing authority or his designated representative may authorize an employee to work periods of time in excess of the employee's normal workweek, dependent upon workload demands, and shall assure that the authorization is in writing.

(b) The appointing authority shall assure that the original written authorization to work overtime in accordance with SSA(3)(a), of this regulation, is retained by the agency for auditing purposes.

(4) Compensatory Leave.

(a) Executive, administrative, and professional employees, whose classifications are not on the list of employees to receive overtime payments, are eligible to earn compensatory leave.

(b) Compensatory leave, if granted, may be used by the employee within 1 year after it has been earned, or shall be forfeited.

B. Eligibility for Earning Leave.

(1) Leave time is earned by:

(a) Full-time employees;

(b) Part-time employees;

APX. 83.

DEPARTMENT OF PERSONNEL

CODE OF MARYLAND REGULATIONS, 06.01.01.14D

Overtime Pay; Exceptions.

(1) List of Employees to Receive Overtime Payments. The Secretary shall determine the classifications for which overtime payments are mandatory, and shall maintain a list of those classifications. The Secretary shall provide appointing authorities with copies of that list. Overtime cash payments may not be made to executive, administrative, or professional employees except in instances of a bona fide emergency directly affecting public safety, as determined by the appointing authority and approved by the Secretary. In these bona fide emergency circumstance, the Secretary shall specify the time period during which cash overtime payments are authorized, the payment rate, and such other limitations or requirements as the Secretary deems necessary.

(2) Computation of Overtime Payments.

(a) The appointing authority shall assure that overtime payments are made at straight time for time worked up to and including 40 hours per week.

(b) The appointing authority shall assure that overtime payments are made at time and one-half the regular hourly rate for time worked in excess of 40 hours per week. The regular hourly rate is determined by dividing total straight time earnings, including shift differential, by the total number of hours worked.

(c) The appointing authority of a hospital or domiciliary care facility for the ill, aged or handicapped where the operations do not lend themselves to the normal work week as described in Regulation .42A(1)(a), of this chapter, shall assure that overtime payments are made as the greater of either of the following:

(i) Time and one-half the regular hourly rate for all hours worked in excess of 80 hours in the 14-day period; or

(ii) Time and one-half the regular hourly rate for all hours worked in excess of 8 hours for each day worked in the 14-day period.

(d) An appointing authority may adopt alternate work schedules as permitted by the Fair Labor Standards Act, 29 U.S.C., §201, et seq., for the purpose of determining overtime compensation for the appointing authority's law enforcement employees or fire fighters.

. . .

APX. 86.



(2)
No. 91-650

FILED
JAN 17 1992
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THE MARYLAND CLASSIFIED
EMPLOYEES ASSOCIATION, INC., ET AL.,
Petitioners.

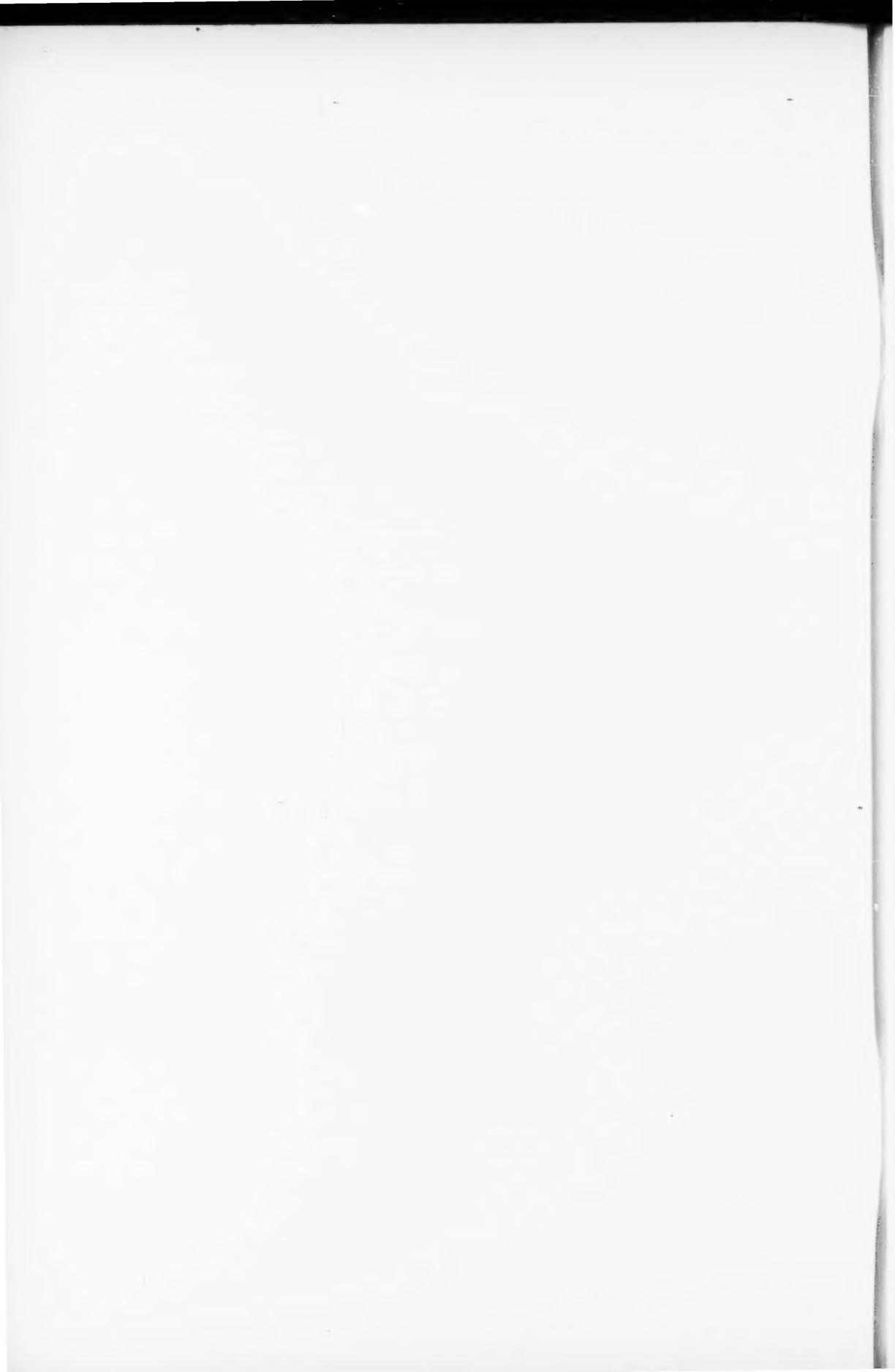
v.

WILLIAM DONALD SCHAEFER,
GOVERNOR OF MARYLAND, AND
THE STATE OF MARYLAND, ET AL.,
Respondents.

SUPPLEMENTAL APPENDIX TO THE WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

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Counsel for Petitioners.



No. 91-650

IN THE
SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1991

THE MARYLAND CLASSIFIED
EMPLOYEES ASSOCIATION, ET AL,

Petitioners,

v.

WILLIAM DONALD SCHAEFER, GOVERNOR
OF THE STATE OF MARYLAND

Respondents.

SUPPLEMENTAL APPENDIX: THE DECISION
OF THE COURT OF APPEALS OF MARYLAND



SUPPLEMENTAL APPENDIX

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IN THE COURT OF APPEALS OF MARYLAND

No. 50

September Term, 1991

THE MARYLAND CLASSIFIED EMPLOYEES
ASSOCIATION, INC. et al. and AMERICAN
FEDERATION OF STATE, COUNTY, AND
MUNICIPAL EMPLOYEES, COUNCIL 92,
MARYLAND STATE EMPLOYEES UNION et al.

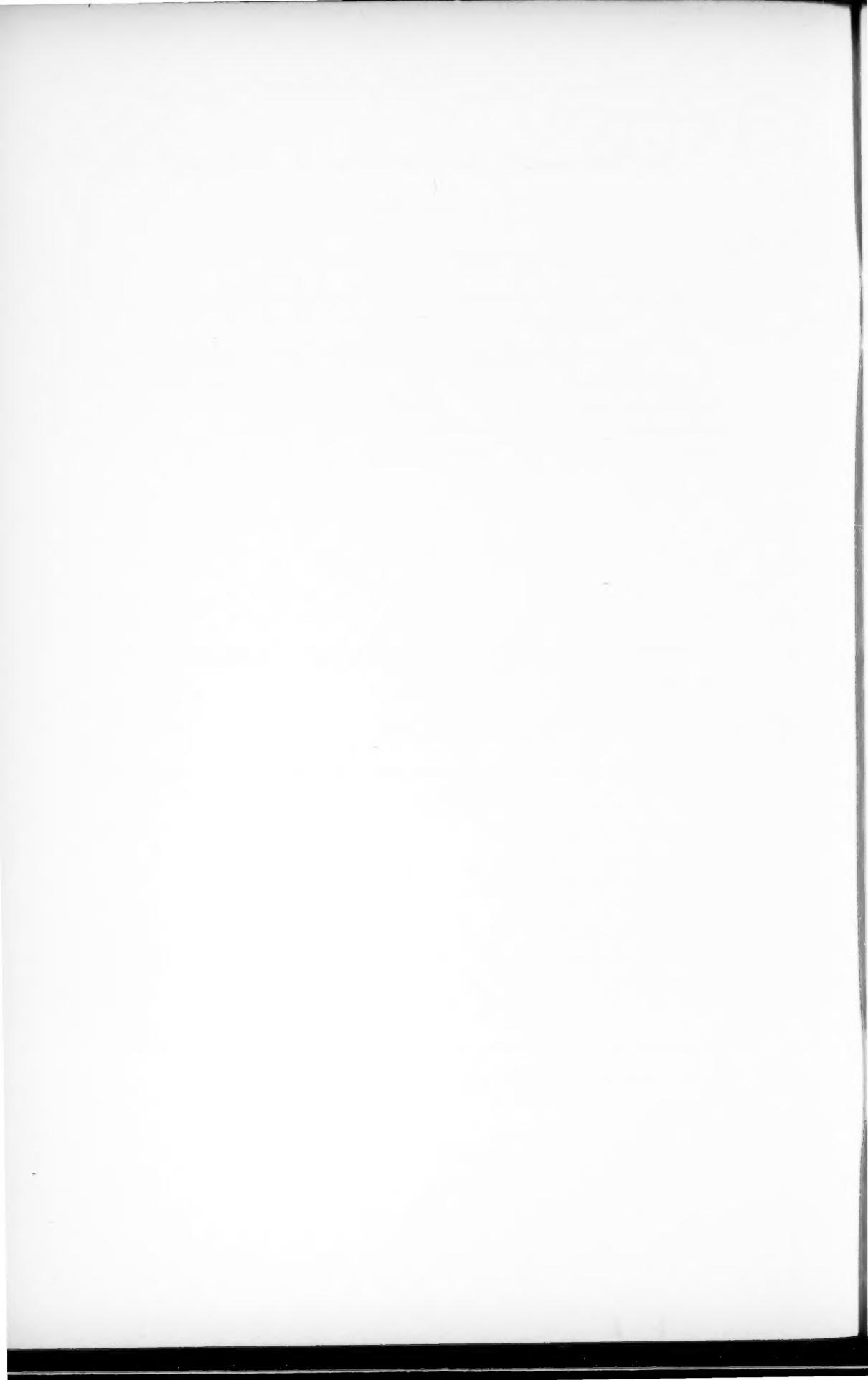
v.

GOVERNOR WILLIAM DONALD SCHAEFER
et al.

Murphy, C.J.
Eldridge
Rodowsky
McAuliffe
Chasanow
Karwacki
Bell,
JJ.

OPINION BY MURPHY, C.J.

Filed: December 12, 1991



This case involves the validity of an Executive Order promulgated by the Governor of Maryland, which increased the work week for substantial numbers of State Executive Branch employees from 35½ hours per week to 40 hours, without additional compensation.

I.

Governor William Donald Schaefer, by Executive Order dated February 27, 1991, decreed that "[t]he normal work week for State employees [in the Executive Branch of Government] shall be 40 hours effective July 1, 1991."¹ The Executive Order directed the Secretary of Personnel and the appointing authorities to "take all actions

¹ By appropriate directives issued by the administrative head of the Judiciary and by the presiding officers of the General Assembly, employees of both branches were similarly required to work a 40-hour week.

necessary or desirable to implement this directive." In his order, the Governor stated that "[t]he federal government, most private and public sector employees, and one-third of State employees presently work 40 hours a week"; that it was prudent "[d]uring these difficult fiscal times . . . to search for savings for the taxpayers of this State"; and that a standardized "40 hour work week for State government will achieve cost containment through increased productivity and employee development."

Two separate declaratory judgement actions were thereafter instituted in the Circuit Court for Anne Arundel County to declare the Governor's Executive Order void ab initio. The first action was filed by the Maryland Classified Employees Association, Inc., and various of its employee members; the second action was

filed by the American Federation of State, County and Municipal Employees and a number of classified employees. Named as defendants were the Governor, the State of Maryland, the Secretary of Personnel, and the Board of Regents of the University of Maryland.

The plaintiffs in each suit (hereinafter collectively the plaintiffs) averred that the Code of Maryland Regulations (COMAR) 06.01.01.42A(1) (a) defined a full-time work week as "5 work days, and at least 35½ hours up to a maximum of 40 hours"; that the appointing authorities are authorized by law to designate the work week for all positions under their control; that for many years the appointing authorities have designated 35½ hours as the normal work week for Executive Branch employees; and that, as

the Governor is not the appointing authority, his Executive Order cannot lawfully change the work week hours. The plaintiffs further alleged that Maryland Code (1985 Repl. Vol., 1990 Cum. Supp.), Article 100, § 76 provides that "every State employee who works in excess of the normal work week . . . shall receive extra compensation for such hours worked in excess of that time"; that the Governor's order violates this law and requires Executive Branch employees to work an additional 4.5 hours without paying the additional compensation mandated by § 76; and that the Governor is not empowered, absent legislative authorization, to make changes that are inconsistent with the

existing law.²

In their suits, the plaintiffs claimed that, as classified State employees, they have "a property right in their employment [which] cannot be taken from them without due process of law"; and that the Governor's order deprives them of their wages by requiring that they work greater hours without additional pay or benefits. In this regard, the plaintiffs asserted that the Governor and the other defendants, through their actions, violated the "separation of powers" provisions of Article 8 of the Maryland Declaration of Rights by attempting to execute a

² When first enacted in 1945, this provision was codified as Code, Article 100, § 77. Since October 1, 1991, the provision is codified as Code (1991 Repl. Vol.), Article 89, § 27. For simplicity, all references to this statute in this opinion are to former Article 100, § 76.

legislative function, specifically the regulation of overtime pay in conflict with the provisions of § 76. The plaintiffs claimed that because they "accepted jobs with compensation established on a 35½ hour work week, . . . worked at those jobs for many years, . . . made child care, home and family commitments based on the State's promise of a 35½ hour work week, [they] have acquired a vested right . . . in the continuation of a 35½ hour work week, and compensation for hours worked in excess of 35½ hours." Moreover, based upon these alleged facts, the plaintiffs averred that they have an express or implied contract with the State to work a 35½-hour work week, with overtime or compensatory time for all hours worked in excess of 35½ hours; and that as a result of the Governor's order, their contract with the

State has been breached and will cause them monetary and nonmonetary damages.

The plaintiffs also asserted that the Governor's order violated provisions of Code (1988 Repl. Vol., 1991 Cum. Supp.), Article 64A (the State's Merit System Law), pursuant to which the Secretary of Personnel promulgated the State's "Salary Plan." As to this, the plaintiffs stated that, under § 27 of Article 64A, the Secretary must recommend to the Governor a pay plan for State employees "to the end that all positions in the service involving comparable skills, knowledge, effort, responsibility, and working conditions shall be paid comparable salaries in accordance with the relative value of the services to be performed." The plaintiffs alleged that the Secretary's Salary Plan has the force of law and includes a rule

that the rate of pay for any employment classification cannot be changed except as authorized by the Legislature; and when the salary plan became effective, the duties and classifications of the plaintiffs were those performed within a 35½-hour work week. Consequently, they averred that "the salaries and compensation for the classifications in the salary plan were established by the Secretary and approved by the Governor fully recognizing that the compensation rates were a 35½ hour work week and that the employees would receive additional overtime compensation for all hours worked in excess of 35½ hours per week." According to the plaintiffs' suits, to increase the hours of the work week results in lowering the rate of pay for positions within the salary plan, an action that cannot lawfully be initiated except

by the Secretary in accordance with the provisions of § 27 of Article 64A; that the pay plan cannot otherwise lawfully be amended; but that "the Secretary and Governor failed to act as required by said section which requires that the amended pay plan be reported to the General Assembly by the 15th day of a regular session which was not done." Because of this failure, the plaintiffs asserted that the Governor's Executive Order, which in effect altered the salary plan, was not within his lawful authority and was therefore invalid.

The parties entered into a detailed stipulation of facts which, inter alia, stated that the Governor's order was actually implemented by the appointing authorities; and that 33,438 State employees in the Executive Branch, who work 35½ hours per week, were thereby affected.

It was further stipulated that the regular work week of 21,175 State Executive Branch employees is 40 hours; that in the University of Maryland System, 5,083 employees presently work 40 hours per week and 5,262 employees work fewer than 40 hours per week; and that those employees whose work week has been 35½ hours earn cash overtime or compensatory leave for hours worked in excess of 35½ hours per week. It was also stipulated that there are 442 employment classifications in the State merit system; that merit system employees are paid on an annual basis; that in establishing the rates of pay for the classifications in the State Salary Plan, the hours worked by employees are not taken into consideration; and that consequently 40-hour employees receive the same salaries as 35½-hour employees working in the same

classification. Finally, it was stipulated that the Secretary of Personnel reported no amendments to the salary plan to the General Assembly in January of 1991.

The cases were consolidated and cross-motions for summary judgment were filed by the parties upon the further stipulation that the exhibits in support of the defendants' motion for summary judgment were genuine, authentic, and admissible, if relevant. The circuit court (Thieme, J.) granted summary judgement for the defendants on July 9, 1991. It found no dispute as to any material fact and concluded in a detailed opinion that, as a matter of law, there was no merit in any of the plaintiffs' allegations.

Claiming that the case was one of "monumental significance," the plaintiffs appealed to the Court of Special Appeals.

They simultaneously petitioned this Court for a writ of certiorari to bypass the intermediate appellate court, as authorized by Code (1989 Repl. Vol., 1991 Cum. Supp.), § 12-201 of the Courts and Judicial Proceedings Article. In their petitions, the plaintiffs presented these issues for our review:

"1. Whether the Governor's Executive Order requiring the Plaintiffs to work a 40 hour work week without additional compensation violates the doctrine of Separation of Powers.

"2. Whether the Governor's Executive Order requiring the Plaintiffs to work a 40 hour work week without additional compensation violates the Plaintiff's contract rights.

"3. Whether the Governor's Executive Order requiring Plaintiffs to work a 40 hour work week without additional compensation violates the Plaintiffs' procedural due process rights.

"4. Whether the Governor's Executive Order requiring

Plaintiffs to work a 40 hour work week without additional compensation violates the State's Pay Plan Law."

We granted certiorari and advanced the matter on the docket to promptly resolve the important issues raised in the case. By per curiam order dated July 17, 1991, we affirmed the judgement of the Circuit Court for Anne Arundel County "for reasons to be stated in an opinion later to be filed." We now give our reasons for that determination.

II.

The executive power of the State is vested in the Governor of Maryland by Article II, § 1 of the Constitution of Maryland. Maryland Code (1984, 1991 Cum. Supp.), § 3-302 of the State Government Article provides that the Governor, unless otherwise provided by law, "shall supervise

and direct the officers and units" in the Executive Branch of government. Section 3-401 of this Article defines an Executive Order of the Governor, inter alia, as one which adopts "guidelines, rules of conduct, or rules of procedure for:

- (i) State employees;
- (ii) units of the State government; or
- (iii) persons who are under the jurisdiction of those employees, or units or who deal with them."³

Code (1990 Repl. Vol.), Article 41, § 9-101 creates the Department of Personnel as a principal department of State government. Its head, appointed by the Governor, is the Secretary of Personnel, who is charged with responsibility for the operation of the department. The Secretary

³ The Attorney General of Maryland has opined that an Executive Order issued by the Governor has the force of law as long as it is not inconsistent with an existing statute. See 64 Op. Att'y Gen. 180 (1979).

is directed to establish guidelines and procedures to promote the orderly and efficient administration of the department. Section 9-105 authorizes the Secretary of Personnel to promulgate rules and regulations for the governance of the Department. Code (1988 Repl. Vol., 1991 Cum. Supp.), Article 64A, § 11 also authorizes the Secretary of Personnel, in the administration of the State's merit system law, to make rules and regulations as may be deemed necessary. Section 27 of this Article empowers the Secretary to recommend to the Governor "a pay plan for all classified and unclassified positions for which the Secretary has authority to administer pay." This section outlines various criteria to be considered by the Secretary in his salary plan recommendations to the Governor. It also

provides that the pay plan take effect when funds for that purpose are available within the State Budget. Code (1988), § 7-108(b) of the State Finance and Procurement Article requires the Governor to include in each Budget Bill "the current salary plan of the Secretary of Personnel as the basis for the appropriations to pay those salaries to which the plan applies."

COMAR 06.01.01.42A(1), the applicable personnel rule promulgated by the Secretary of Personnel, provides that the "full-time work week consists of 5 work days, and at least 35½ hours up to a maximum of 40 hours." It also provides that "[t]he appointing authority shall designate the work week for all positions under the appointing authority's control, and shall file the designation with the Secretary [,which] is effective until the appointing

authority changes it." Subsection (f) provides that work in excess of a position's normal work week shall be compensated by overtime payments or by compensatory leave.)

In its present form, § 76(a) specifies that, unless otherwise provided, "every State employee [in the Executive Branch] who works in excess of the normal work week . . . shall receive extra compensation for such hours worked in excess of that time." This section also provided, inter alia, that "[p]ayment for time worked in excess of the position's normal work week but not in excess of 40 hours shall be made at the employee's usual hourly rate or rates."

III.

Separation of Powers

We first consider the plaintiffs' contention that the Governor, by his Executive Order, contravened the legislative mandate of a $35\frac{1}{2}$ -hour work week contained in Article 100, § 76. They claim that, in doing so, the Governor usurped the plenary power of the General Assembly and exercised a legislative function, thereby unlawfully denying State employees the overtime compensation required by § 76 for work in excess of $35\frac{1}{2}$ hours per week.

In the circuit court, Judge Thieme concluded that the Governor was "specifically authorized, through the legislative grant of authority to the Secretary of Personnel, to control virtually all aspects of employment including the work week for State employees

in the Executive branch." He further said that, as head of the Executive Branch of government, the Governor was authorized to direct and supervise the officers of that branch, including the Secretary of Personnel who serves at his pleasure. Judge Thieme noted that the Secretary has been given extremely broad power by the Legislature in matters concerning State personnel, including rule-making authority to carry out the provisions of the merit system law. The authority vested in the Secretary, Judge Thieme observed, encompassed establishing "the number of hours in a work week," and as the Secretary was the Governor's appointee and subject to his direction, the Governor's Executive Order was within his authority to promulgate. Specifically, Judge Thieme said that the definition of an Executive

Order in § 3-401 of the State Government Article was sufficiently broad "to allow the Governor to control and direct the officers over whom he is statutorily given control . . . [including] the essential aspects of state employment such as hours in a work week."

In reaching this determination, Judge Thieme recognized that the Governor cannot by Executive Order "undo what the legislature has done by statute." He said, however, that the Governor, in promulgating his Executive Order, did not attempt to override § 76, because that statute deals with overtime compensation and simply directs "that employees who work in excess of their normal work week, but less than 40 hours, will be compensated at the usual hourly rate." Section 76, Judge Thieme said, does not establish that the normal

work week is $35\frac{1}{2}$ hours, and that work in excess of those hours is compensable. In support of his conclusion, Judge Thieme reviewed the history underlying the provision of a "normal work week" and the meaning of § 76. He said that Personnel Rule 42E (now set forth in COMAR as 06.01.01.42A) established the normal work week "to be not less than $35\frac{1}{2}$ hours and not more than 40 hours"; that had the Legislature intended to mandate a $35\frac{1}{2}$ -hour work week contrary to the Secretary's regulation, it would have expressly so provided; and that the Governor's action did not therefore contravene the doctrine of separation of powers. Judge Thieme observed:

"[T]he Governor's action does not render the statute a nullity, for the statute remains perfectly valid unless the designation of the work week has been changed to 40 hours, as was done in this instance. The simple fact

that the employees will not be able to take advantage of the statute does not render it a nullity since its usefulness was predicated upon the flexibility of the work week. In the future if the work week is reduced the statute will once again be controlling for hours worked in excess of the designated work week short of 40 hours."

We are in full agreement with Judge Thieme's reasons for granting summary judgment for the defendants. There is simply no merit to the plaintiffs' argument that the normal work week, as used in § 76, is the "established level or pattern of work," namely, 35½ hours per week. As earlier indicated, nothing in the language of § 76 fixed the normal work week of State employees at 35½ hours. Regulation 42E of the then Commissioner of Personnel (precursor of the Secretary of Personnel), which was extant at the time that § 76 was amended to refer to a "normal work week,"

defines that term to mean not less than 35½ hours but not more than 40 hours.

As its history demonstrates, § 76 was enacted to alleviate the plight of State employees who received no overtime compensation regardless of the number of hours or days worked during a week. In this regard, the stipulated facts show that, on November 16, 1944, the Governor was urged to establish a uniform rule governing the work week of State classified employees. At that time, the work week varied from agency to agency, with some office employees working 5½ days, others working greater hours, and at least one employee required to work 6½ days per week. No overtime compensation was permitted in any of these instances. It was recommended to the Governor that the official work week be limited to 6 days, but that those

agencies on a 5½-day work week be allowed to continue, and that overtime compensation be paid for more than 6 days and for working on Sunday and 13 holidays.

By ch. 1015 of the Acts of 1945 (an emergency enactment), the General Assembly added former Article 100, § 76. In its original form, overtime was to be paid to any State employee, except hourly employees, for work in excess of 48 hours per week. Thereafter, on September 13, 1945, the Commissioner of State Employment and Registration (another precursor of the Secretary), with the approval of the State Board of Public Works (which is comprised of the Governor, the Comptroller, and the State Treasurer), issued a Bulletin fixing the work week at 5 days; the hours on 4 of those days were from 9 a.m. to 5 p.m. and on the 5th day from 9 a.m. to 5:30 p.m.

Excluding luncheon and other breaks, the Bulletin contemplated 40½ hours during a 5-day week, even though ch. 1015 of the Acts of 1945 referred to overtime compensation only after 48 hours had been worked. The substance of the Bulletin was later incorporated into and became known as Regulation 42E. It is thus clear that the General Assembly, by its 1945 enactment of ch. 1015, addressed the issue of overtime compensation while the Commissioner, by Regulation 42E, addressed the separate issue of a standard work week.

The General Assembly amended § 76 by ch. 319 of the Acts of 1947 to exclude certain agencies from its scope. Chapter 52 of the Acts of 1952 again amended the statute by reducing the overtime compensation threshold to 44 hours for all employees other than hourly employees.

Although the Legislature was presumptively aware of Rule 42E, see Board of Educ., Garrett Co. v. Lendo, 295 Md. 55, 453 A.2d 1185 (1982), neither of these acts changed the substance of the personnel regulation -- an indication that the Legislature did not intend that § 76 establish a fixed work week.

Chapter 130 of the Acts of 1956 further amended § 76 by dividing State employees into four classes -- (1) shift workers, who were to receive overtime after 40 hours, (2) nonshift workers, who were to receive overtime after 44 hours, (3) hourly workers, who were ineligible for overtime, and (4) supervisory personnel, who also were ineligible for overtime. Thereafter, the Commissioner of Personnel wrote to the Board of Public Works concerning the requirements of that

enactment. On May 24, 1956, with the concurrence of the Board of Public Works and the approval of the Governor, the Commissioner of Personnel amended Rule 42E as follows:

"E. Work Week, Overtime and Compensatory Credits

1. Work Week. By authority of the Board of Public Works, the 5 day normal work week is:

For institutional employees other than office workers: 40 hours.

For institutional office employees and all employees of general State departments
- Not less than $35\frac{1}{2}$ hours.

3. Overtime. As provided by Chapter 130, Acts of 1956, payments for overtime work are to be based on authorization of Commissioner, on file in respective State agency, and Central Payroll Bureau or other prescribed payroll unit."

The amendments to Rule 42E treated the work week and overtime compensation as two separate categories. The reference to ch. 130 of the Acts of 1956 in the personnel

regulation was applicable only to overtime compensation.

By chs. 6 and 31 of the Acts of 1958, the General Assembly, with some exceptions, established the threshold for overtime compensation at 40 hours. Rule 42E was again amended to show this change in the overtime compensation permitted by law.

By ch. 167 of the Acts of 1969, § 76 was again amended in several particulars to comply with requirements of the federal Fair Labor Standards Act for payment of time and a half, rather than straight time, for hours worked in excess of 40 hours. Conforming amendments to Rule 42E were made on July 1, 1970. On June 30, 1974, Rule 42E was incorporated within COMAR without substantive change and is now numbered as 06.01.01.42A(1).

In 1978, the COMAR regulation was

amended to read:

"(1) (a) The appointing authority shall designate the work week for all positions under his control. The designation of work week hours is effective until the appointing authority changes it. (b) Full-time Employees. The work week consists of 5 working days, and not fewer than 35½ hours nor more than 40 hours."

Thereafter, by ch. 233 of the Acts of 1985, § 76 was again amended; its substance, as now, was that State employees who work in excess of the normal work week shall receive overtime compensation for hours worked in excess of that time.

None of the many amendments to either § 76 or the regulations of the Secretary of Personnel indicate a change in the basic dichotomy, begun in 1945, between the establishment of the work week hours and overtime compensation, namely, that the Legislature would exercise authority over

payment for overtime, while the Executive Branch would designate the work week.⁴ The contemporaneous construction of § 76 by the then Commissioner of State Employment and Registration, by his successors, the Commissioner of Personnel and the Secretary of Personnel, and the Board of Public Works, continuously followed to the present day, plainly mitigates against the interpretation of § 76 as specifying a fixed work week. In this regard, our cases have long held that "a construction placed on a statute by administrative officials soon after its enactment is strong, persuasive influence in determining the judicial construction and should not be

⁴ Chapter 372 of the Acts of 1989 specifically conferred rule-making authority on the Secretary of Personnel with respect to compensatory time, subject to federal law and election by the employee.

disregarded except for the strongest and most urgent reason." Board of Educ., Garrett Co. v. Lendo, supra, 295 Md. at 63. See also Falik v. Prince George's Hosp., 322 Md. 409, 588 A.2d 324 (1991). While no custom, however venerable, can nullify the plain meaning and purpose of a statute, Macke Co. v. Comptroller, 302 Md. 18, 22-23, 485 A.2d 254 (1984), legislative acquiescence in a long-standing administrative construction "'gives rise to a strong presumption that the interpretation is correct.'" Morris v. Prince George's County, 319 Md. 597, 613, 573 A.2d 1346 (1990) (quoting Sinai Hosp. v. Dep't of Employment, 309 Md. 28, 46, 522 A.2d 382, 391 (1987)). Furthermore, "[t]he General Assembly is presumed to have had, and acted with respect to, full knowledge and information as to prior and existing

law and legislation on the subject of the statute and the policy of the prior law." Board of Educ., Garrett Co., supra, 295 Md. at 63.

As we have already observed, the Governor, as the head of the Executive Branch, has broad powers with respect to Executive Branch State employees and over the Secretary of Personnel, who exercises his power subject to the Governor and carries out the Governor's policies with respect to personnel matters. Consequently, there is no foundation to the plaintiffs' argument that the Governor has no authority to fix the normal work week by Executive Order.

IV.

Implied Contract

Before Judge Thieme, the plaintiffs argued that the State is estopped from

changing the work week of those employees who, at the time of Executive Order was issued, held positions in which the work week was designated at 35½ hours. They relied on the theory of an implied contract to continue to work only those hours, or to be paid for hours in excess of 35½ hours. Judge Thieme said that "it is inconceivable that any implied contract purporting to fix the work week could be validly made" in light of the clear language of the regulation that work week hours are changeable within the range of 35½ to 40 hours per week. He noted that COMAR 06.01.01.42A provides that "[t]he appointing authority shall designate the work week for all positions under the appointing authority's control, [and that the] . . . designation of work week hours is effective until the appointing authority

changes it." In view of these provisions, Judge Thieme emphasized that "the regulations clearly contemplate a flexible work week within the range set subject to change by the appointing authority [and therefore] any implied contract must necessarily exist within the frame work of the existing rules and regulations, which in this instance preclude the implication of a fixed work week."

For the reasons stated by Judge Thieme, there is no merit to plaintiffs' implied contract argument.

V.

Procedural Due Process

— The plaintiffs maintained in the circuit court, as they do before us, that the Governor's Executive Order constitutes a "taking" of the property interests of State employees in contravention of their

due process rights. Specifically, they argued that by increasing the number of hours worked without increasing compensation, the Governor deprived them of their right to additional compensation without the traditional due process rights to notice, hearing, and an opportunity to be heard. As to this, Judge Thieme observed that there was no "taking" of a constitutionally protected property interest because the existing regulation of the Secretary of Personnel clearly defined the work week and specified that it is subject to change at the discretion of the appointing authorities. Consequently, he said, that since there was no property interest, there could be no denial of due process. He concluded that "[f]ar from creating an entitlement, the work week regulations affirmatively deny

the creation of any property interest in a 35½-hour work week." In so concluding, the circuit court held that nothing in the Supreme Court cases relied upon by the plaintiffs mandated a different result.⁵ We are in full accord with Judge Thieme's reasoning.

VI.

State Pay Plan

The plaintiffs urge us to find that the Governor's Executive Order violated the State Pay Plan because it was inconsistent with certain procedures required by the Legislature before employees' salaries may be amended. Specifically, they claim that the Governor contravened § 27 of Article

⁵ The plaintiffs placed primary reliance upon *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972), and *Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970).

64A by altering salaries of State employees without the legislative approval required by that statute. In this regard, the plaintiffs say that a change in the work week is a change in the salary plan, and that such a change cannot be effectuated by an Executive Order.

Judge Thieme concluded that a change in the work week was not a change in the salary plan. He reasoned that, because State employees are salaried and are paid based upon the classification that they hold, "a change in the number of hours worked does not alter the salary they make or the amount of money the State must pay out from the State Treasury." He said:

"To be sure, the net effect of working more hours for the same pay on the individual level is a decrease in hourly pay, but such a decrease in 'calculated' pay is not what the pay plan procedures were implemented for. The pay plan is a budgetary creature and is concerned with the 'actual'

payroll. Since the pay plan is not in fact altered the procedures it requires are not at issue."

As previously noted, the provisions of Article 64A, § 27 (a) (1) (i) require that the Secretary "recommend to the Governor a pay plan for all classified and unclassified positions for which the Secretary has authority to administer pay." The section requires that the Secretary, in making his recommendations to the Governor, consider various criteria, including "working conditions," in establishing salary comparability and rates of pay; it also provides, in subparagraph (a) (1) (iv), that the Secretary, with the Governor's approval, "may amend the pay plan for specific classifications of positions in order to recruit or retain competent personnel or to ensure that

compensation rates adequately compensate the skills, knowledge, effort, responsibility, and working conditions."⁶ Subparagraph (a) (3) (v) provides that amendments to the pay plan shall be reported to the General Assembly by the 15th day of the next regular session of the Legislature. It also provides that that body may reject amendments to the pay plan.

It was stipulated by the parties that no amendments to the salary plan were reported to the General Assembly in January of 1991. It was also stipulated that

⁶ Code, Article 64A, § 1(4) defines "class" to mean "a grouping of one or more positions sufficiently similar with respect to duties and responsibilities that the same descriptive title may be used to designate each position in that grouping and that the same general qualifications are needed for performance of the duties, that the same tests of fitness shall be used to select employees, and that the same rates of pay shall be applied to all positions in that grouping."

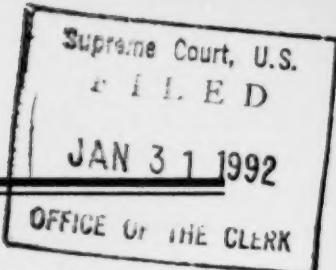
employees in the 442 employment classifications in the State personnel system are paid on an annual basis; that in establishing rates of pay for these classifications in the salary plan, the hours worked by employees are not taken into consideration; and that as a consequence 40-hour employees receive the same salary as 35½-hour employees working in the same classification.

In its most basic form, it is the plaintiffs' argument that an increase in the hours of the work week is a "working condition" within the contemplation of Article 64A, § 27 (a) (i) which, because the increase results in a reduction of salaries, constitutes an amendment to the pay plan. Hence, they say that this criteria for establishing rates of pay had to be factored into an amended pay plan and

reported to the General Assembly before it could be implemented.

The fiscal year 1991 State Budget documents show that the increase in the work hours resulted in a cost-savings through the denial of additional appropriations for new positions and by reducing overtime costs. The increased hours did not cause a reduction of any salaries within the pay plan. Because there was no amendment to the pay plan, no notice to the General Assembly was required under § 27 (a) (3) (v). We, therefore, share Judge Thieme's conclusion that the Governor's Executive Order did not effectuate an amendment to the State pay plan.

(3)
No. 91-650



IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THE MARYLAND CLASSIFIED EMPLOYEES
ASSOCIATION, INC., *et al.*,

Petitioners,

v.

WILLIAM DONALD SCHAEFER, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari
To The Court Of Appeals Of Maryland

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

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**COUNTERSTATEMENT OF
QUESTION PRESENTED FOR REVIEW**

Did the Court of Appeals of Maryland hold correctly that no contract right was violated by an Executive Order promulgated by the Governor of Maryland which increased the work week for certain state employees from 35½ hours per week to 40 hours without any corresponding increase in pay?

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**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

COUNTERSTATEMENT OF THE CASE

Petitioners filed this suit in the Circuit Court for Anne Arundel County, Maryland, challenging an Executive Order issued by the Governor of Maryland which increased the number of hours of certain

state employees from 35½ hours to 40 hours a week, without any additional compensation. (App. at 37a.) In their complaint, Petitioners asserted that the Executive Order violated numerous constitutional and statutory rights, including their rights under the Contract Clause of Article I, § 10 of the United States Constitution. (App. at 54a.) In their subsequent motion for summary judgment, however, Petitioners set forth no reasons or argument in support of their Contract Clause claim. Following the filing of the State's cross-motion for summary judgment, and after holding a hearing on the motions, the circuit court entered judgment in favor of the State. (App. at 4a-22a.)

Petitioners appealed the circuit court's decision and simultaneously petitioned the Court of Appeals of Maryland, the highest court in the State, for a writ of certiorari prior to judgment in the intermediate

appellate court. (Supp. App. at 12a.) The Court of Appeals granted review, unanimously upheld the validity of the Executive Order by a per curiam order dated July 17, 1991, and stated its reasons would be provided in an opinion to be filed. (App. at 2a.) After the filing of the petition to this Court, the Court of Appeals issued its opinion on December 12, 1991. (Supp. App. at 1a.)

REASONS FOR DENYING THE WRIT

A. Petitioners Assert A Claim Not Raised In Or Decided By The Courts Below.

The central thrust of the petition rests on the assertion that Petitioners have a contract right which was impaired in violation of Article I, § 10 of the United States Constitution. That claim, however, was neither raised in nor decided by any of the courts below. Although reference to the Contract Clause was made in the complaint for declaratory judgment that Petitioners filed

in the Circuit Court for Anne Arundel County (App. at 54a) as well as in the petition for a writ of certiorari they filed in the Maryland Court of Appeals (*id.* at 63a-64a), Petitioners never briefed the issue raised here.¹ Accordingly, neither of the courts below addressed the Contract Clause claim that Petitioners ask this Court to review. For these reasons, this Court should decline to consider that claim. See DeShaney v. Winnebago County Department of Social Services, 109 S.Ct. 998, 1003 n. 2 (1989); Youngberg v. Romeo, 457 U.S. 307, 316 n. 19 (1982); Dothart v. Rawlinson, 433 U.S. 321, 323 n. 1 (1977); Adickes v. S. H. Kress & Co., 398 U.S. 144, 147 n. 2 (1970).

¹ In its cross-motion for summary judgment, the State argued that under state law Petitioners abandoned their Contract Clause claim and other rights that were raised in the complaint but not addressed in Petitioners' summary judgment motion. Petitioners never sought to cure this omission.

B. The Petition Does Not Present A Substantial Federal Question.

Review is also unwarranted because the issue of whether Petitioners have a contract right to work 35 $\frac{1}{2}$ hours each week is a question of state law only that this Court has no jurisdiction to review. Both courts below properly considered applicable state rules and regulations in concluding that no such contract right exists. (App. at 13a-16a; Supp. App. at 32a-34a.) There is no reason for this Court to exercise its discretionary jurisdiction to review the matter further.

CONCLUSION

For the reasons stated, the petition
should be denied.

Respectfully submitted,

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